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CALCUTTA HIGH COURT & PRIVY COUNCIL.

Reports—Civil and Criminal.

PRIVY COUNCIL.

(Appeal from the Patna High Court).

(s. c. (1939) M. W. N. 185 ; A. I. R (1939) P. C. 47 ; (1939) O. W. N. 282 ; 20 P. L. T. 265 ; 11 Ind. Rul. (1939) P. C. 166 ; 49 L. W. 349 ; 180 I. C. 1 ; 43 C. W. N. 473).

Present :—Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter and Sir George Rankin.

20th January, 1939.

PAKALA NARAYANA SWAMI—Appellant.

v.

THE KING-EMPEROR—Respondent.

The question whether the alleged statement of the accused to the Police before arrest is protected by Sec. 162 of the Cr. P. Code.

Held—That the majority of the High Courts has no application to a statement made by a person who at the time it is tendered in evidence is an accused person : the minority is no such limitation.

Under Sec. 32 of the Indian Evidence Act of 1872, the statement must be made of the transaction has taken place that the person making it must be at any rate near death.

The natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.

PAKALA NARAYANA SWAMI *v.* EMPEROR.

But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown or was not the person accused Such a statement might indeed be exculpatory or the person accused. " Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than *res gestæ*. Circumstances must have some proximate relation to the actual occurrence ; though as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. That the " circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that " the cause of the death comes in to question."

The facts of the case appear from the Judgment.

Messrs. *D. N. Pritt*, K. C., and *H. W. Williams*—for the Appellant.

Messrs. *G. D. Roberts*, K. C., *W. Wallach* and *J. Megaw*—for the Respondents.

Lord Atkin.—This is an appeal by special leave from a judgment of the High Court of Patna who affirmed the decision of the Sessions Judge at Berhampur who had convicted the appellant of the murder of one Kurres Nukaraju and sentenced him to death. The accused, his wife, his wife's brother, and his clerk living at his house were charged with the murder before the Sub-Divisional Magistrate, Chatrapur, in May and June, 1937. After hearing the evidence, the examining Magistrate discharged all the accused holding that there was no sufficient evidence to support the charge. Thereupon the Sessions Judge, Berhampur, exercising his powers under the Cr. P. Code, called upon the accused to show cause why they should not be committed for trial and in July, 1937, ordered the present accused and his wife to be committed to the Court of Session to stand their trial for offences under sections of the I. P. Code 120 B (conspiring to murder) 302 (murder) and 201 (causing evidence of an offence to disappear). At the trial the Sessions Judge acquitted the appellant's wife of all the charges but convicted the appellant of murder and sentenced him to death. The

appeal is based upon the admission of certain evidence said to be made inadmissible by provisions of the Cr. P. Code and the Evidence Act: and is further maintained upon the contention that whether the disputed evidence be admitted or not, and certainly if it ought to have been rejected, there is no evidence sufficient to support this conviction.

On Tuesday, March 23, 1937, at about noon the body of the deceased man was found in a steel trunk in a third class compartment at Puri, the terminus of a branch line on the Bengal-Nagpur Railway, where the trunk had been left unclaimed. The body had been cut into seven portions, and the medical evidence left no doubt that the man had been murdered. A few days elapsed before identification but eventually the body of the deceased was identified by his widow. He was a man of about 40 and had been married about 22 years. He had been a peon in the service of the Dewan of Pithapur, one of whose daughters was the wife of the accused. It was suggested by the prosecution that before her marriage and about 19 years before the events in question, the wife of the accused then a girl of about 13 had had an intrigue with the deceased. Four letters were produced by deceased's widow purporting to be signed by the girl bearing date 1918 supporting this suggestion. The Judge was not satisfied with the evidence of handwriting: there was no other evidence worth considering in support: and this suggested motive must be definitely rejected. The fact, however, remains that the deceased was in possession of these four documents purporting to be signed by the wife of the accused. About 1919 the accused and his wife were married. They went to live at Berhampur about 250 miles from Pithapur. About 1933 they returned to Pithapur where they appear to have stayed with her father. They seem at that time to have been in need of money: and during 1936 the accused's wife borrowed from the deceased man at various times and in relatively small sums an amount of Rs. 3,000 at interest at the rate of 18 per cent. per annum. About 50 letters and notes proving these transactions singned by the accused's wife were found in the deceased man's house at pithapur after his death. On Saturday, March 20, 1937, the deceased man received a letter, the contents of which were not accurately proved, but it was reasonably clear that it invited him to come that day or next day to Berhampur. It was unsigned. The widow said that on that day her husband showed her a letter and

said that he was going to Berhampur as the appellant's wife had written to him and told him to go and receive payment of his due. This evidence was objected to: it was admitted as falling under the provisions of Sec 32 (i) of the Indian Evidence Act. The admission of this evidence is one of the grounds of the appeal, and will be discussed later. The deceased left his house on Sunday, March 21, in time to catch the train for Berhampur. On Tuesday, March 23, his body was found in the train at Puri as already stated.

Police suspicion does not appear to have been directed against the accused and his household until April 4, on which date the Police visited the house, examined the inhabitants and obtained a statement from the accused, the admissibility of which is one of the principal grounds of the appeal. They searched the premises as is said for incriminating documents only, and in the afternoon arrested the four persons already mentioned. In addition to evidence of the facts above stated, the prosecution adduced the evidence of two employees in a shop at Berhampur where trunks were made and sold who gave evidence that on monday, March 22, in the afternoon the washerman of the accused called at the shop and ordered a trunk that a trunk was taken to the accused's house and shown to him and his wife. It was rejected as being too large and a smaller one of the size of the trunk in question was then delivered to the washerman at the shop and he took it away. The transaction was entered in the rough day book and in the fair copy book of the shop as of the day in question; and though the trial Judge thought that the entry had been tempered with so as to insert the height of the trunk, the trial Judge and the High Court both of whom inspected the entries were satisfied that they genuinely established the sale of such a trunk on that day. The witnesses identified the trunk in which the body was found as being the trunk of their manufacture which was sold in the circumstances stated on the Monday afternoon. The washerman was called and proved the purchase of a trunk after the rejection by the accused of the first one brought from the shop. He, however, placed the date as being on a Saturday. The Judge thought his evidence was unreliable and said that he ignored it. He, however, found the sale of the particular trunk was proved to have taken place as stated by the witnesses on Monday, March 22. The prosecution then sought to prove that the accused took the trunk to the train in which it was

found on Tuesday, March 23. Evidence was given by a JHATKA driver who lived near the accused that early in the morning some four months before the trial, the accused had come to his house and said he wanted a JHATKA: that he drove to the accused's house, a trunk which was like the trunk in question was loaded on the JETKA and he drove the accused with the trunk to the station where the trunk was unloaded and taken into the station. The evidence was corroborated by a man who ran alongside the JHATKA in charge of the horse which was fresh. The defence relied strongly on statements made by both these witnesses on cross-examination that they remembered that the occasion was a Saturday as it was a SHANDY (fair) day at Berhampur. Both Courts accepted the evidence as relating to the carriage of this trunk on the 23rd. They thought that the difference as to date was an inaccuracy due to a BONA FIDE mistake. A witness of repute spoke to seeing the accused at the station on the morning of March 23, when the train on which the trunk was found arrived. He could not say that he saw the accused enter the train. When the accused was examined by the Police at his house on April 4, it is alleged that he made the statement which the defence sought to have rejected and which must be further discussed. The alleged statement was that the deceased had come to his house on the evening of March 21, slept in one of the outhouse rooms for the night and left on the evening of the 22nd by the passenger train. That on the morning of March 23, the accused went to the station with Gangulu (the JHATKA driver) in his JHATKA and went off by the passenger train to Chatrapur on some private business with one Delhi Chiranjivirao. Hearing at the Chatrapur station that this man was away he returned by the Vizagapatam passenger train as far as Jagannadhpur whence he went to Narendrapur to see one Juria Naiko. He, too, was absent so the accused returned to Berhampur by JAHTKA. This statement was obviously important for it admitted that the murdered man arrived at the accused's house on the 21st. Both Courts admitted it. Their Lordships are of opinion that it should have been rejected for reasons that will be given later. The accused and the other three members of his household were arrested on the 4th, and the house remained unoccupied. On the 7th a further search of the premises was made by the Police, and a bundle of rags which apparently had been washed but contained bloodstains was found buried at a depth of about

18 inches in the compound. Some rags also bloodstained but still damp were found in a box in the bathroom. The trial Judge accepted this evidence: on appeal both of the Judges thought that the articles found were not on the premises when the Police searched on the 4th: Mr. Justice Manohar Lall thought that the discovery was made under highly suspicious circumstances and that no inference should be drawn against the accused in respect of it. In this state of the case their Lordships think that it would be unsafe to rely upon the discoveries on April 7. Before the examining Magistrate the accused's statement was that he was not guilty. He had come to Berhampur on March 17, in connection with a law suit of which he gave some particulars. He neither purchased the trunk through the washerman nor did he take it to any place in any JHATKA. The deceased never came to his house at any time in March last. He did not know the deceased. At the trial he said that the statement he had made in the lower Court was correct. When asked by the Judge whether he could suggest any reason why so many witnesses should come and give evidence against him he said. "The witnesses are mistaken and the Police are suffering from excessive zeal".

The first question with which their Lordships propose to deal is whether the statement of the widow that on March 20, the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues was admissible under Sec. 32 (1) of the Indian Evidence Act, 1872. That section provides:

"Statements written or verbal of relevant facts made by a person who is dead . . . are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death, and what ever may be the nature of the proceeding in which the cause of his death comes into question."

A variety of questions has been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when

and where the death was caused. There Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed by exculpatory of the person accused. " Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in " circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than RES GESTÆ. Circumstances must have some proximate relation to the actual occurrence : though as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose.

It will be observed that " the circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility, of the evidence is that " the cause of death comes into question". In the present case the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on March 21, or March 22 : and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on March 20 or 21, that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.

It is now necessary to discuss the question whether the alleged statement of the accused to the Police before arrest

was protected by Sec. 162 of the Cr. P. Code which provides (sub-Sec. 1) :—

"No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it : nor shall any such statement or any record thereof whether in a Police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such trial was made."

This section which in its amended form was substituted for the original section by Sec. 34 of the Cr. P. Code Amendment Act, 1923, has been the subject of repeated decisions in the High Courts of India and has given rise to a distinct cleavage of opinion. The majority of the High Courts have held that it has no application to a statement made by a person who at the time it is tendered in evidence is an accused person : the majority have held that there is no such limitation. Their Lordships have been referred to at least twelve reported cases, all of which with others they have considered. The representative opinions on either side may be taken to be THE KING EMPEROR v. AZIMUDDY (1) in a judgment of the then Rankin, J., admitting such a statement against the accused and THE KING-EMPEROR v. SYAMO MAHA PATRO (2) in in a judgment of Reilly, J. sitting in a Full Bench of the High Court of Madras rejecting the statement. The present Board have had the advantage of the presence of Sir George Rankin in giving a full consideration to all the reported decisions : and they have come to the conclusion that the words of the section lead to the conclusion that the statement is not admissible even when made by the person ultimately accused.

The reference in the section to "this chapter" is to the group of sections beginning with Chap. XIV forming Part V of the Code entitled : "Information to the Police and their powers to investigate". After giving powers to certain Police Officers to investigate certain crimes, the Code Proceeds in Sec 160

(1) 28 Cr. L. J. 99 ; A. I. R. 1927 Cal, 17 ; 44 C. L. J. 253 ; 99 I. C. 227 ; 54 C. 237.

(2) (1932) Cr. Cas. 355 (F. B.) ; A. I. R. 1932 Mad. 391 ; 62 M. L. J. 742 ; 35 L. W. 705 ; 33 Cr. L. J. 418 ; Ind. Rul. (1932) Mad. 338 ; (1932) M. W. N. 305 ; 137 Ind. Cas. 9 ; 55 M. 903.

to give power to any Police Officer making an investigation by an order in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By Sec. 161 any Policeman making an investigation under the chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those, the answers to which may tend to incriminate him. Then follows the section in question which is drawn in the same general way relating to "any person". That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must, therefore, apply to a statement made by a person possibly not then even suspected but eventually accused. "Any such statement" must, therefore, include such a case : and it would appear that if the statement is to be admitted at all, it can only be by limiting the words " used for any purpose" by the addition of such words " except as evidence for or against the person making it when accused of an offence". If such an exception were intended, one would except to find it expressed and their Lordships cannot find sufficient grounds for so departing from the plain words used. If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of Police testimony as to alleged statements or both. In any case the reasons would apply as might be thought A FORTIORI to an alleged statement made by a person ultimately accused. But in truth when the meaning of words is plain, it is not the duty of the Courts to busy themselves with supposed intentions.

I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminister Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the

instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

(Lord Wensleydale in GREY v. PEARSON (1).

" My Lords, to quote from the language of Tindal, C. J. when delivering the opinion of the Judges in the *Sussex Peerage Case* (2) " The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble which according to Dyer, C. J. (*Stowel* v. *Lord Zouch* (3) is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress."

Lord Halsbury, L. C. in COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME-TAX v. PEMSEL (4).

In this case the words themselves declare the intention of the Legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on Secs. 25, 26 and 27 of the Indian Evidence Act, 1872. Sec. 25 provides that no confession made to a Police Officer shall be proved against an accused. Sec. 26.—No confession made by any person whilst he is in the custody of a Police Officer shall be proved as against such person. Sec. 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of Police Officer, so much of such information whether it amounts to a confession or not may be proved. It is said that to give Sec. 162 of the Code the construction contended for would be to repeal Sec. 27 of the Evidence Act for a statement giving rise to a discovery

(1) 108 R. R. 19 ; 5 W. R. 454 ; 3 Jur (N S.) 823 . 26 L. J. Ch. 473 ; (1857) 6 H. L. C. 61 at p. 106.
(2) 65 R. R. 11 ; 8 Jur 793 ; (1844) 11 Cl. & Fin 85 at p. 143.
(3) (1562) Plowd at p. 369.
(4) (1891) A. C. 531 at p. 542.

could not then be proved. It is obvious that the two sections can, in some circumstances, stand together. Sec. 163 is confined to statements made to a Police Officer in course of an investigation. Sec. 25 covers a confession made to a Police Officer before any investigation has begun or otherwise not in the course of an investigation. Sec. 27 seems to be intended to be a proviso to Sec. 26 which includes any statement made by a person whilst in custody of the Police and appears to apply to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by Sec. 162. Whether to give to Sec. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by Sec. 27, it does not seem necessary to decide. In the present case the declarant was not in the custody of the Police, and no alleged discovery was made in consequence of his statement. The words of Sec. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a Police Officer in course of investigation whether a discovery is made or not. They may, therefore, PRO TANTO repeal the provisions of the section which would otherwise apply. If they do not presumably, it would be on the ground that Sec. 27 of the Evidence Act is a "special law within the meaning of Sec. 1 (2) of the Cr. P. Code, and that Sec. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to Sec. 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on Sec. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under Sec 164. In view of their Lordships' decision that the alleged statement was inadmissible by reason of Sec. 162, the appellants contention that it was inadmissible as a confession under Sec. 25 of the Evidence Act becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian Courts on the matter, it may be useful to state that in their Lordships view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts

which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession e. g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22 of Stephens "Digest of the Law of Evidence" which defines a confession as a admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions in order to have a general term for use in the three following articles, confession secured by inducement made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872, and in that Act, it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he commitaed" the crime.

The statement of the accused has now been held to have been wrongly admitted. What effect should that have on the appeal ? Mr. Pritt, for the appellant, forcibly argued that the trial Judge relied on the statement as sufficient evidence in itself to show that the deceased man arrived at the accused's house on the night of March 21, and that when that evidence failed, there was not sufficient evidence to support a conviction for murder. Their Lordships cannot take that view. For this purpose they will be content to abide by the rule governing the Patna High Court expressed in Sec. 537 of the Cr. P. Code :

"No finding sentence or order passed by a Court of competent jurisdiction shall be reversed . . . . on appeal . . , on account of any error in the judgment or other proceedings during trial...unless such error has in fact occasioned a failure of justice".

They will, for this case, adopt this rule though it probably is wider than the rules which this Board has laid down for the exercise of their powers in dealing with criminal appeals. It will be observed that the sole effect of the disputed statement was to supply the prosecution with evidence of the material

fact that the deceased reached the accused's house at the critical time. But though this evidence be rejected, there is other evidence of overwhelming strength to the same effect. It must be taken to have been proved that a trunk was bought by order of the accused and taken to his house on the afternoon of March 22. At about 6 A.M. on March 23, that trunk containing the body of the deceased was placed on the train at the station of Berhampur having been conveyed there in a vehicle ordered by the accused in which he and the trunk travelled to the station. The deceased had on the day before set out from his house for the express purpose of visiting the accused's house.

In these circumstances there is ample evidence of the presence of the deceased at the accused's house; the fact which alone the statement sought to establish. Faced with this difficulty Mr. Pritt sought to establish that in no case whether the statement be rejected or admitted was there sufficient evidence of his client's guilt. The facts were consistent, he said, with the accused being merely an accessory after the fact to a murder to which he was no party. Their Lordships are unable to say that there was not ample evidence upon which the judge of fact could properly convict of murder. The accused man was found to have been in possession of a trunk in which was the mutilated body of a man recently murdered, a trunk which he purchased a little more than 12 hours before the trunk was placed in the train. He gave no explanation and contended himself with a denial that he knew the man, or that the man had visited his house, or that he had seen the trunk. All these statements were untrue. In these circumstances, it is impossible to say that the proceedings which ended with a conviction for murder resulted in a failure of justice. For these reasons, the appeal should be dismissed and their Lorships will humbly advise His Majesty accordingy.

Mr. *Hy. S. L. Polak & Co.*—Solicitor for the Appellant.

The Solicitor, India Office—Solicitor for the Respondent.

M.

(s. c.) 11 Ind. Rul. Cal. 719 ; 43 C. W. N 194 ; A. I. R. (1939) Cal. 79 ; 180 I. C. 673.

Civil Rule No. 251 of 1938.

Present :—BISWAS, J.

11th November, 1938.

MUNICIPAL COMMISSIONERS, PABNA.

v.

ANUKUL CHANDRA MAITRA and others.

Suit to recover taxes—The Bengal Municipal Act (1932) Secs. 141 and 142 and Sec. 51—Chairman's power.

Sec. 51 of the Act however, merely authorizes the Chairman to exercise the powers vested in the commissioners by the Act and will not obviously confer on his any delegated authority to act on behalf of the commissioners in respect of matters not authorized by the Act.

Held—That the defendants are not entitled to claim the benifit of the revision or reduction which the Chairman is supposed to have allowed. Nor are they entitled to any statutory reduction of the amount in claim by virtue of Sec. 142.

The facts appear from the Judgment.

Appeal from the order of the Sub-Judge of Pabna.

Messrs. *S. C. Lahiri* and *A. C. Roy*—for the Petitioner.

Mr. *K. K. Maitra*—for the Opposite Party.

Judgment—This Rule has been obtained by the Commissioner of the Pabna Municipality and arises out of a suit to recover rates and taxes due to the Municipality from the defendants in respect of 15 quarters, namely, from the third quarter of 1933-34 to the first quarter of 1937-38, both inclusive. The rates were assessed at Rs. 5-8-3 per quarter up to the end of 1935-36 and at Rs. 6-15-9 per quarter for the remaining period. The total amount due for the period sued for at these rates was Rs. 90-1-3 : including interest the total claim amounted to Rs. 100-14-3 (Rupees one hundred and annas fourteen and pies three). The suit was dismissed by the learned Subordinate Judge of Pabna exercising Small Cause Court jurisdiction.

The first point taken before him was that the suit not manitainable. It was contended that under s. 15, Bengal Municipal Act, 1932, the plaintiffs should have been designated as the Municipal Commissioners of Pabna, and not in the way stated in the plaint. It was pointed out that under the corresponding section of the old Act, the Commissioners were

entitled to sue in the name of their Chairman, by the description of 'Chairman of the Municipal Commissioners of the place concerned." Such a description, the argument proceeded, would be wholly improper under the present Act. The learned Subordinate Judge gave effect to this objection. There was an application by the plaintiffs for amendment of the plaint in order to bring the cause-title strictly in line with the requirements of Sec. 15. But, the learned Subordinate Judge rejected the application. The same objection to the maintainability of the suit has been renewed in this Court by the defendant-opposite party. I do not think, however, that there is any substance in it. In the first place, the plaint shows that the plaintiffs were not described in the way suggested by the defendants opposite party, or in the way contemplated in the old Sec 29. The plaintiffs are stated to be "the Commissioners of the Pabna Municipality," but certain words are added thereafter which might as well have been struck out. These words are: "represented by the Chairman RAI BAHADUR Radhikanath Bose." I am of opinion that the designation of the plaintiffs in the plaint was in substantial compliance with the provisions of Sec 15. Secondly, in any case, I think that if the defendants or the Court were inclined to be so meticulous, the amendment ought to have been allowed, specially as this would not have occasioned any prejudice to anybody.

The next ground on which the suit was dismissed relates to the merits of the case. The defendants' case is that the holding, in question, for which the rates claimed were due, had been vacant throughout the period for which the demand was made, and that consequently the defendants were entitled to vacancy remission. According to the defendants, they had given notice of vacancy in writing to the Municipality. If they had, then there is no doubt that the defendants would be entitled to claim remission to the extent of ¼th of the tax under Sec. 142 of the Act. The learned Subordinate Judge in dealing with the evidence on the point, however, says that there is no satisfactory proof of the alleged service of the vacancy notices on the Municipality. I have read the evidence myself and I find that although the defendants state that they had given vacacy notices, the Municipal officers who have been examined on behalf of the plaintiffs categorically denied the receipt of such notices. I must therefore accept the finding that vacancy notices had not been given. That being so, Sec. 142 cannot

possibly come into play, notwithstandig that the holding might have remained vacant in point of fact for the period in suit. Defendant No. 1 says that he had approached the Chairman of the Municipality and this officer had expressly granted remission. The amounts of rates due for the whole of the period. it is said was actually reduced by the Chairman to Rs. 20-12-3. This is admitted on behalf of the plaintiffs. Witness No. 1 for the plaintiffs in fact states :

> It was settled that the tax of Rs. 20-12-3 would be payable by defendant No. 1 and acceptable to the Municipality. and he goes on to add a condition in these terms : if he paid in all Rs. 81 odd for two buildings and one carriage immediately."

and he further stated that in default of such payment the concession would be withdrawn. Assuming this to have been, so, the question arises whether any such settlement, if made by the Chairman, would be binding upon the Commissioners. I am clearly of opinion that the answer should be in the negative. The only grounds on which remissions or reduction of rates may be allowed under the Bengal Municipal Act (1932) are set out in Secs. 141 and 142. Sec. 141 deals with a case of excessive hardship and admittedly it has no application in the present case. Sec. 142 speaks of remission on the ground of vacancy, but it is made contingent upon the party seeking remission giving notice of vacancy in writing to the Municipality. This condition as already stated was not held to have been established here. Sec. 142, therefore, cannot be of any assistance to the defendants. So far as the powers of the Chairman to bind the Municipality are concerned, they are to be found in Sec. 51. This sections, however, merely authorizes the Chairman to exercise the powers vested in the Commissioners by the Act and will not obviously confer on him any delegated authority to act on behalf of the Commissioners in respect of matters not authorized by the Act. If therefore in this instance the Chairman had allowed the reduction or remission without acting in conformity with the provisions of the Act, the Municipality cannot be bound by such act. The defendants accordingly, in my opinion, are not entitled to claim the benefit of the remission or reduction which the Chairman is supposed to have allowed. Nor are they entitled to any statutory reduction of the amount in claim by virtue of Sec. 142.

MUNICIPAL COMMISSIONERS, PABNA v. ANUKUL CHANDRA.

The learned Subordinate Judge, in my opinion, was therefore not justified in dismissing the suit. The judgment and decree of the learned Subordinate Judge will be set aside and there will be a decree in favour of the plaintiffs Municipality for the amount claimed with costs. The petitioners will get their costs of this Rule hearing fee being assessed at one gold MOHUR.

M.

(s. c) 11 Ind. Rul, Cal. 717 ; 43 C. W. N. 102 ; A. I. R. (1939) Cal. 81 ; 180 I. C. 679.

Appeal No. 986 of 1936.

Present :—JACK. J,

5th July, 1938.

CHARU CHANDRA BASU and others.

v.

NRITYA GOPAL BASU and others.

Limitation Act Sec. 144,—Whether barred—Execution of the mortgage decree—Shebaitship debutter,—*Recovery of possession.*

Held—That both in case of a lease and in case of a sale, limitation will start from the date of the death of the last *shebaits* responsible for the transfer.

Held again—That a *shebait* is not in the position of a trustee and there can be no doubt as to the law on the subject and that limitation in case of a sale as well as of a permanant lease will run from the date of death of the alienating *shebait*.

Appeal against the decree of the Sub-Judge of Hooghly.

The facts appear from the Judgment.

Mr. *A. N. Bose*, Dr. *R. B. Pal* and Mr. *P. Chatterji*—for the Appellants.

Messrs. *R. P. Mukherji* and *K. N. Tagore*—for the Respondents.

Judgment—This appeal has arisen out of a suit for recovery of possession on declaration of DEBUTTER title to certain properties, described in the plaint, which were alienated by some of the SHEBAITS of Sree Sree Iswar Sridhar Jew, who is plaintiff No. 1. The other SHEBAITS were made PRO FORMA defendants. The suit was decreed as regards the properties

except properties Nos. 1 to 7 and 9 of Sch. 4. As regards these properties the suit was dismissed by the Appellate Court on the ground of limitation and the only question which arises in this appeal is whether the suit is barred by limitation under Sec. 144, Limitation Act. The learned Judge has held that the period of limitation starts from the period at which delivery of possession in execution of the mortgage decreed took place, whereas, for the appellants, it is contended that the period of limitation starts from the death of the last of the mortgagors. This took place in 1339 corresponding to 1932 and if the contention of the appellants is correct as regards the starting point, then the suit will not be barred by limitation, having been within 12 years of the date of death of the last alienating mortgagor. On the point of limitation, the trial Court decided in favour of the plaintiffs relying on the decision in RAM CHARAN DAS v. NAURANGI LAL (1). The Appellate Court in reversing the decision of the trial Court relied upon the case in SUBBAIYA PANDARAM v. MOHAMAD MUSTAFA MARACAYAR (2), and also upon the case in RONALD DUNCAN CROMARTIE and FRANCIS ARTHUR SHEPHARD v. RADHA DAMODAR (3).

In this appeal the learned Advocate for the appellants has, in addition to the case relied upon by trial Court, relied upon the latter case in MAHADEO PRASAD SINGH v. KARIA BHARTI (4), and has distinguished the case in SUBBAIYA PANDA RAM v. MOHAMAD MUSTAFA MARACAYAR (2), as being the case of a trustee, in which it was held that a trustee was at liberty to dispose of the trust properties during the period of his life and a grant made for a longer period was good but good only to the extent of his own life interest with the result that possession during his life was not adverse. But, it was held that that argument has no relation to the case of a property acquired

(1) 17 R. D. 754 (P.C.); 35 Bom. L. R. 530; 57 C. L. J. 229; (1933) A. L. J. 327; 37 C. W. N. 541; 10 O. W. N. 455; (1933) M. W. N. 272; 64 M. L. J. 505; 37 L. W. 512; 14 P. L. T. 185; Ind. Rul. (1933) P. C. 56; 12 Pat. 251; A. I. R. (1933) P. C. 75; 142 I. C. 214; 60 I. A. 124.

(2) 40 C. L. J. 20 (P.C.); 33 M. L. T. 285; 2 Pat. L. R. 104; 28 C. W. N. 493; (1924) M. W. N. 65; 18 L. W. 903; 25 Bom. L. R. 1275; 45 M. L. J. 588; 21 A. L. J. 730; 46 M. 751; A. I. R. 1923 P. C. 175; 74 I. C. 492; 50 I. A. 295.

(3) 9 R. C. 595; 166 I. C. 859; 62 C. L. J. 10.

(4) 37 P. L. R. 311 (P.C.); (1935) A. L. J. 678; 37 Bom. L. R. 333; 61 C. L. J. 122; 68 M. L. J. 499; 39 C. W. N. 433; 41 L. W. 291; (1935) M. W. N. 162; 7 R. P. C. 133; (1935) O. W. N. 247; 57 A. 159; A. I. R. 1935 P. C. 44; 153 I. C. 1100; 62 I. A. 47.

under an execution sale and of which possession had been retained throughout. Whatever may have been the view adopted in the older case, however, it is clear, since the decision in RAM CHARAN DAS v. NAURANGI LAL (1), that both in case of a lease and in case of a sale limitation will start from the date of the death of the last SHEBAITS responsible for the transfer and upon the accession of a new SHEBAIT, a fresh period of limitation commences. In this case it was laid down that :

"a *mahant* has power (apart from any question of necessity) to create an interest in property appertaining to the *math* which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of *mahant* of the *math*, the result that adverse possession of the particular property will only commence when the *mahant* who had disposed of it ceases to be *mahant* by death or otherwise.

If this be right, as it must be taken to be, where "the disposition by the *mahant* purports to be a grant of a permanent lease", their Lordships are unable to see why the position is not the same where the disposition purports to be an absolute grant of the property ; nor, was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the *mahant* had power to create an interest in the property of the *math*"

In this case there was not only a MUKARRARI lease but also a sale and it was held that limitation under Art. 144, Limitation Act, only commenced when the MAHANT ceased to be a MAHANT. For the respondent, it it sought to distinguish that case which was followed in MAHADEO PRASAD SINGH v. KARIA BHARTI (2), on the ground, (1) that in that case it was only a limited interest which was transferred, but as I pointed out, this was not so in RAM CHARAN'S case (1), and also on the ground (2) that in those cases the plaintiff was in possession, whereas in the present case, the plaintiff was not in possession. But in RAM CHARAN'S case (1), also the plaintiff appears to

(1) 17 R. D. 754 (P.C.) 35 Bom. L. R. 530 ; 57 C. L. J. 229 ; (1933) A. L. J. 327 ; 37 C W. N. 541 ; 10 O. W. N. 455 ; (1933) M. W. N. 272 ; 64 M. L. J. 505 ; 37 L. W. 512 14 P. L. T. 185 ; Ind. Rul. (1933) P. C. 56 ; A. I. R. 1933 P.C. 75 ; 142 I. C. 214 ; 60 I. A. 124.

(2) 39 P. L. R. 311 (P.C.) ; (1935) A. L. J. 678 ; 37 Bom. L. R. 333 ; 61 C. L. J. 122 ; 68 M. L. J. 499 ; 39 C. W. N. 433 ; 41 L. W. 291 ; (1935) M. W. N. 162 ; 7 R. P. C. 133 ; (1935) O. W. N. 247 ; 57 A. 159 ; A. I. R. 1935 P. C. 44 ; 153 I. C. 1100 ; 62 I. A. 47.

have been out of a possession. So this is a case which is in distinguishable from the cases on which the appellants rely. In RONALD DUNCAN CROMARTIE and FRANCIS ARTHUR SHEPHARD v. RADHA DAMODAR (1), it was held that :

"The true rule deducible in cases where properties are sold in execution of a decree the period of limitation will run from the date of the sale and the suit brought after 12 years from that date of sale must be held to be barred by limitation.

But here the learned Judge was referring to a case where a trustee had wrongly dealt with properties of a trust, whereas it has been held that Shebait is not in the position of a trustee. After the decision in RAM CHARAN DAS v. NAURANGI LAL (2), there can be no doubt as to the law on the subject and that limitation in case of a sale as well as of a permanant lease will run from the date of death of the alienating Shebait. This appeal is accordingly allowed, the decree of lower Appellate Court set aside and that of the trial Court restored. The appellants will get their costs of this appeal and of that in the lower Appellate Court.

M.

(1) 9 R. C. 595 ; 166 I. C. 859 ; 62 C. L. J. 10.

(2) 17 R. D. 754 (P.C.) ; 35 Bom. L. R. 530 ; 57 C. L. J. 229 ; (1933) A. L. J. 327 ; 37 C. W. N. 541 ; 10 O. W. N. 455 ; (1933) M. W. N. 272 ; 64 M. L. J. 505 ; 37 L. W. 512 ; 14 P. L. T. 185 ; Ind. Rul. (1933) P. C. 56 ; 12 Pat. 251 ; A. I. R. 1933 P.C. 75 ; 148 I. C. 214 ; 60 I. A. 12,.

Matrimonial Suit No. 27 of 1935.

Present :—MCNAIR, J.

31st January, 1938.

H. R. H. BULL

v.

MRS. B. S. BULL.

Divorce Act (IV of 1869) Secs. 18, 19—Declaration of nullity of marriage—Allegation impotency—Delay in bring the suit—Burden of proof.

Held—That there is no evidence in this case to show that the respondent has in any way suffered from the delay of the petitioner in brining the suit and

such delay is not of itself a bar to relief, but it has an important bearing on the evidence by which the charge of impotence is sought to be established and upon the measure of proof required. The burden of proof in this case is heavier owing to the delay in bringing the suit and the petitioners has failed to discharge that burden.

The facts appear from the Judgment.

Mr. *S. C. Isaacs*—for the Petitioner.

Messrs. *J. A Clough* and *A. C. Ganguly*—for the Respondent.

Judgment :—This is a husband's suit for a declaration of nullity of marriage under the Divorce Act. Both the petitioner and the respondent are domiciled in India and profess the Christian religion. The ceremony of marriage was performed on May 11, 1928, in Darjeeling. The petition alleged that the marriage had never been consummated and that the respondent at the time of the said marriage and ever since has been incapable of consummating the same. In her answer the respondent alleged that she was at all times and is now capable of consummating the marriage and the marriage has in fact been consummated. The parties met at Kurseong through the petitioner's sister during the Pujas of 1926. In 1927 they met at the Jalpaiguri Camp on the footing of an engaged couple. They were married on May 11, 1928, at Darjeeling. They lived at Darjeeling for four or five days with her parents at Francis Villa, thereafter for a fortnight in Calcutta until they sailed for England from Bombay. They stayed in England for rather more than four months for the most part with the respondent's sister at Higham's Park. They left England by steamer on October 18, 1928, and arrived in Bombay and came by train to Calcutta on November 11, 1928. At one time they intended to go to Darjeeling, together for a few days before the pttitioner returned to his garden at Telepara where he was the Assistant Manager of a tea estate. They had arranged that he should go back to the garden by himself in any event, because there was no bungalow to which the resdondent could be taken. There was a quarrel of somewhat violent nature in the house of the petitioner's mother in Calcutta on November 11, after which a reconciliation took place and the respondent went to Darjeeling to her people, while the petitioner remained in Calcutta owing to ill-health and was treated at the Tropical School.

The parties then corresponded on amicable terms. But apparently they both harboured feelings of resentment, and towards the end of November, the petitioner wrote to say that he would not go up to Darjeeling but would return direct to his garden at Telepara. During the last week in November, the respondent came down to Calcutta bringing letters which had been re-addressed to Darjeeling from the tea estate, and amongst these was a bill for the keep of an illegitimate child who had been born as the result of a connection between the petitioner and one of his tea garden coolies in 1924, and who had been cared for and educated at the Kalimpong Homes. It is clear that the respondent first came to know at this time in Calcutta of the existence of the petitioner's illegitimate child whose name is Gilbert. There was again a reconciliation and the petitioner returned to his garden while the respondent went back to her people at Francis Villa, Darjeeling.

On December 14, 1928, the petitioner wrote to say that a separation was inevitable. The respondent then wrote to him for money which he refused on the ground that he had given her £200, which was said to be half of his capital shortly before they left England. In February 1929 she instituted maintenance proceedings in the Sub-Divisional Officer's Court at Jalpaiguri, which the petitioner did not contest although he was represented, and an order was made that the petitioner should pay to the respondent an allowance of Rs. 100 a month. At the end of 1929 the petitioner came to Calcutta and consulted a member of the Bar with regard to his matrimonial difficulties when he was advised that he could bring an action for nullity. In 1934 he again went on leave to England where he states that he met a girl whom he wished to marry, and, having consulted solicitors in London, in November 1935, he instituted these proceedings.

The petitioner's case is that from the time of his marriage in May, 1928 and for four or five months at frequent intervals he attemptad to have sexual relations with the respondent, but that although she submitted to intimate caresses and marital endearments she refused to allow the marriage to be consummated. To complete the chronological order of events, I may mention that on January 7, 1936, shortly after the petitioner had filed his petition the respondent went to Col. Gow, an eminent medical practitioner, and Professor of midwifery and

gynæcology in Calcutta, and obtained from him a certificate that there was evidence that the marriage, of which the respondent had informed Col. Gow had been consummated. On January 13, the respondent filed her answer, and on April 8, the petitioner obtained an order from this Court calling upon her to give particulars of dates and places, so far as she can remember, at which she alleges that the marriage was consummated. In compliance with that order she filed an affidavit stating that the marriage had been consummated on May 11, 1928, the day of the wedding, on June 11, and frequently during the journey to and the sojourn in England between May and October 1928. The actual wording of this affidavit giving particulars has been subjected to adverse comment by the learned Counsel for the petitioner, and although the drafting is faulty, the meaning, I think, is as I have stated.

On May 5, 1936, there was a medical inspection by two eminent doctors who certified that there was no physical defect or disease such as would render the petitioner incapable of performing the act of generation, that the respondent was not a virgin, and that there was no obstruction to the performance or completion of coitus. On July 10, 1936, the petitioner, in response to an order calling upon him to give particulars of para 6 of his petition in which he had stated that the respondent was incapable of consummating the marriage, stated that the incapacity consisted of a nervous and/or psychic disorder and/or of an invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner was concerned, which rendered her incapable of submitting to sexual intercourse with the petitioner. The following issues were framed :

"(1) Was the respondent at the time of the marriage and is she still incapable of consummating the same for the reasons alleged in the particulars ? (2) Was the marriage consummated ? (3) Is the petitioner estopped from denying that there was a valid marriage by reason of the fact that the parties have lived together as husband and wife, though separated, since 1928, and by reason of the decision of the Jalpaiguri Court in the maintenance proceedings?"

Mr. Isaacs for the petitioner objected to Issue No. 3 on the ground that it did not arise on the pleadings, and further that it is based on an allegation of fact, namely insincerity, which has never been pleaded. Section 18, Divorce Act, provides that any husband or wife may petition for a decree of nullity, and Sec. 19 sets out the grounds for such a decree. The first is, that the

respondent was "impotent at the time of the marriage and at the time of the institution of the suit." It is argued that even if the petitioner has proved that the respondent was impotent at the time of the marriage, there is no evidence to show that she was impotent at the time when the suit was instituted. The petitioner on the other hand states that the invincible repugnance which he has alleged and which, he argued, that he has established is a psychic disorder which was permanent. If the petitioner establishes the form of repugnance which he alleges, that would in my view, be sufficient to satisfy the requirements of Sec. 19, for, it would apparently constitute a permanent physical disability. In giving judgment in a case reported in C. v. C. (1) Lord Birkenhead said :

"It is not usual in these proceedings to meet with a contest of fact, but when such a contest does arise, the difficulty of arriving at a decision is extreme, for the chief actors are the only available witnesses on the most important issues. The petitioner must remove all reasonable doubt, for he has undertaken the burden of proof, and it is important in such a case that he should be compelled to discharge the burden."

If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are much increased. "That", says Lord Birkenhead,

"Is good law and good sense. But the fact that the difficulties are increased does not make them insuperable in such a case, nor is the Court relieved from the duty of weighing the evidence merely because the parties who alone know the truth tell different stories, one of which at least cannot be true."

For this reason a number of incidents have been introduced in evidence which either tend to show the general character of the principal parties or affect their credibility. The difficulties of coming to a decision are again increased because of the medical evidence which is to the effect that the respondent is not a virgin. Dr. Mc. Cay, who was one of the medical inspectors appointed by the Court, says that the genitalia bore the appearance of nonvirginal type, the hymen had almost completely disappeared, and that what he saw was consistent with the case of a woman who had had sexual intercourse with a man. He admitted that there are causes of rupture of the hymen other than intercourse and that even normal virgin

(1) 7 T. L. R. 759 ; 125 L. T. 768 ; 90 L. J. P. C. 345 ; (1921) L. R. P. 399.

hymens are ruptured before coition. Col. Gow gives rather fuller details of the record of his examination, but although his eminence as a gynæcologist is conceded, it is suggested that his evidence may not have the same value because unconsciously he may be prejudiced in favour of the petitioner whom he had examined as a patient shortly after these proceedings were started. The point which seems to me most important in deciding whether the petitioner's story is true is the delay in starting these proceedings. The petitioner has said that he realized his wife's impotence during the short stay in England in 1928. They had parted in November 1929 and in February 1929 the respondent instituted maintenance proceedings which the petitioner did not contest and she has received an allowance of Rs. 100 per month ever since. The petitioner says that he was unaware of the fact that he could institute nullity proceedings but he admits that he consulted legal authority in Calcutta at the end of 1929 and that he then became aware of the possibility. He has also stated that his financial condition did not allow him to institute proceedings then. His pay then was about Rs. 500 a month and his pay now and when these proceedings were instituted is only about Rs. 550 which he has been getting for the last six or seven years, so that there is little change in his actual income. Mr. Issacs urges, on behalf of the petitioner, that it is not his income which was the stumbling block but the fact that during his stay in England in 1928 he had spent the whole of his capital. There is no evidence that he was in possession of any capital in 1935. In fact he had been on leave in 1934 and it is not improbable that again he had spent such capital as he possessed. The petitioner admits that during his leave in 1934 he had met a girl whom he wished to marry and in evidence he has stated very frankly that if these proceedings are successful, he hopes to marry her.

He has on his own admission lived apart from the respondent for six years after he knew that he could bring nullity proceedings, and there is no evidence that his financial condition has materially improved in the meantime. Moreover, he had been paying during these six years nearly onefifth of his income to the respondent who was his wife in name, but with whom he was not living, and from whom he had been advised that he had grounds for being freed. Why then the delay ?

"The law would be very inhuman," says Sir Robert Phillimore in his judgment in W. v. R. (1).

"If it allowed the husband after a long cohabitation without any satisfactory explanation of the delay, to throw his wife in her middle or old age, with ignominy, shame and poverty, upon the world because she had been originally, however innocently, by physical causes incacitated from performing some of the duties of the married state. The law therefore has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress. Perhaps there is no state of things to which the maxim, *Vigilantibus non dormientibus subveniunt leges* is more directly applicable."

It was at one time the view that delay was an absolute bar to success in a suit of this nature but although that view was negatived at a later date, Lord Selborne in his speech in G. v. M. (2) said :

"Where there is a controversy of fact, delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof which is thrown upon the plaintiff. But that there is any definite or absolute bar arising from a certain amount of delay, is a proposition which I apprehend cannot be established either by any Scotch or by any English authorities."

The burden of proof in a case of this kind is always heavy. Even if there had been no unreasonable delay, I would have had considerable difficulty in finding for the petitioner. In view of the length of time which elapsed before the petitioner instituted his suit, and of his failure to account satisfactorily for the delay, I have no hesitation in holding that he has failed to discharge the very heavy burden of proof which in the circumstances is laid upon him. This finding disposes of the suit, but an interesting argument has been addressed to me on Issue No. 3; Mr. Clough contends that the delay not only increases the burden of proof but also operates as an estoppel preventing the petitioner from denying the validity of the marriage, and he relies on the cases referred to by Sir Robert Phillimore in the case to which I have already referred and in particular to the sentence of Dr. Lushington in B. v. B. (3).

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(1) (1876) L. R 1 P. 405.
(2) 53 L. T. 308 : (1885) 10 A. C. 171.
(3) 1 Eccl & Adm. 261.

H. R. H. BULL v. B. S. BULL.

Mr. Isaacs argues that if reliance is placed on an estoppel, it should have been expressly pleaded; but it is not a matter which can always be pleaded except as a general plea, and in many cases, no particulars of such plea could be given, for the facts on which it is based are only ascertained during the evidence. The one guiding principle which emerges is that great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for. In a case reported in ANONYMOUS (1), Dr. Lushington referred to the doctrine laid down in B. v. B. (2) that though the wife may be incapable of sexual intercourse, the husband's suit is barred by his delay or other conduct. One of the bars which is referred to in B. v. B. (2) is the "insincerity" of the suit. "I cannot attempt" says Dr. Lushington,

"to define insincerity, it must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand."

'Sincerity' says Lord Bramwell in G. v. M. (3) "is a very important matter in ascertaining whether the spouse complained of is impotent or not" and his conclusion seems to be that the spouse whose impotence is alleged should not be allowed to object to the complaint unless in some way or another he or she can show that they have sustained some injury from the double matter of the complaint not having been made earlier, and of it being made now. There is no evidence in this case to show that the respondent has in any way suffered from the delay of the petitioner in bringing this suit and in my opinion such delay is not of itself a bar to relief, but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. As I have already stated, the burden of proof in this case is heavier owing to the delay in bringing the suit and the petitioner has failed to discharge that burden. The petition is dismissed with costs including all reserved costs. The costs will be taxed as between party and party on the scale usually applied in matrimonial suits.

M.

(1) 164 E. R. 581; (1857) Deane 295.
(2) 1 Eccl & Adm. 261.
(3) 53 L. T. 398; (1885) 10 A. C. 171.

(s. c.) 22 Ind. Rel. Cal. 757 ; 43 C. W. N. 186 ; 68 C. L. J. 476 ; A. I. R. (1939) Cal. 285 ; 180 I. C. 907.

Appeal No. 1032 of 1937.

Present :—JACK J.

10th August, 1938.

TARAK CHANDRA DAS

v.

CHIEF EXECUTIUE OFFICER, CORPORATION OF CALCUTTA.

The Calcutta Municipal Act (III of 1923) Sec. 363—Municipal Magistrates' power to enquire—Sanction—Withheld or not—Demolition—Magistrate If entitled.

Under the provisions of Sec. 363, Calcutta Municipal Act, if the Corporation are satisfied that the erection of any new building has been commenced without obtaining the written permission of the Corporation, they may apply to a Magistrate, and such Magistrate may make an order directing that such erection or so much thereof as has been executed unlawfully be demolished.

Held—That the section does not give the Magistrate any power to enquire as to whether the sanction was rightly withheld or not. If the sanction was withheld, for whatever reasons, the Magistrate apparently was entitled to order the demolition of the building.

The facts appear from the Judgment.

Appeal against the appellate decree of the Additional District Judge, of 24-Parganas.

Messrs. *H. L. Chakravarty* and *S. C. Mitter*—for the Appellant.

Messrs. *A. C. Gupta* and *K. L. Banerjee*—for the Respondent.

Judgment.—This appeal has arisen out of a suit for declaration that an order for demolition of the plaintiff's second storey, erected over a privy connected with his premises at 31-1, Girish Mukerji Road, is illegal and not binding on the plaintiff and for a permanent injunction restraining the Calcutta Municipal Corporation from executing this order of the Municipal Magistrate. The suit has been dismissed by both the Courts below on the ground that the Civil Court had no jurisdiction to interfere in revision with such an order of the Municipal Magistrate and also that the Magistrate's order was a legal one and should not be interfered with on the merits. The plaintiff applied for sanction to build a privy on the ground floor and he also wanted to build a second storey on the first floor. Eventually he was allowed to build a privy on the

ground floor on condition that he did not apply for building one on the first floor. However, having built a privy on the ground floor, he also built a privy on the first floor, although he had not obtained the sanction for this additional building. In consequence, on an application made by the Corporation to the Municipal Magistrate, he ordered the demolition of the building on the first floor and hence this suit to set aside this order.

Under the provisions of Sec. 363, Calcutta Municipal Act, if the Corporation are satisfied that the erection of any new building has been commenced without obtaining the written permission of the Corporation, they may apply to a Magistrate, and such Magistrate may make an order directing that such erection or so much thereof as has been executed unlawfully be demolished. In this case, the building on the first floor having been erected without the written permission of the Corporation, it was unlawful in the terms of the section and the Municipality was, therefore, right in making the order for demolishing this structure. It is contended for the appellant that the Municipal Magistrate ought to have investigated whether this structure was against the rules or whether the Corporation were entitled to refuse sanction for the erection of this building and that if he found that the Corporation had no right to refuse sanction, no order for demolition should have been passed. There seems to be no authority for this view. The section does not give the Magistrate any power to enquire as to whether the sanction was rightly withheld or not. If the sanction was withheld, for whatever reasons, the Magistrate apparently was entitled to order the demolition of the building. That being the case, there has been in this case no error of law and this Court is not entitled to interfere with the order in second appeal. The appeal must accordingly be dismissed with costs.

M.

(s. c) 11 Ind. Rul. Cal. 756 ; A. I. R. (1939) Cal. 289 ; 180 I. C. 824 ; 68 C. L. J. 478.

Criminal Revision No. 875 of 1938.

Present :—Derbyshire C. J. and Bartley, J.

27th July, 1938.

SHAIKH BADLI MEAH

v.

CORPORATION OF CALCUTTA.

Under Sec. 363 Municipal Act of 1923—Building—Erection—Unlawfully re-construction—Without sanction—Demolition.

The fact there has been a re-construction does not give the Magistrate a right to order demolition unless there has been erection of a new building or alteration of or addition to the existing building.

Held—That the Magistrate has not found any erection of a new building or any alteration of an old building or any addition to a building so the order of the Magistrate can not be sustained. It is essential that the provisions of the Municipal Act should be enforced in the interest of Public health and at the same time it is necessary that they should be enforced according to law.

The facts appear from the Judgment.

Mr. *N. C. Chakravarty*—for the Petitioner.

Messrs. *G. K. Banerjee* and *Balaram Bose*.—for the Opposite Party.

Derbyshire, C.J.—In this case the petitioner, Sheikh Badli Meah, obtained a rule against the Corporation of Calcutta to show cause why an order under Sec. 363, Calcutta Municipal Act, directing the demolition of a hut by the Corporation at the expense of the petitioner, should not be set aside. The relevant facts are these: The petitioner became the owner of a hut situate on some land inside the Municipality of Calcutta in 1929 and has been the owner ever since. In May 1933 the Building Inspector of the Calcutta Corporation observed that work was being done to that hut. He saw that work was being done on May 2. He gave notice for it to cease. On May 7, it had stopped, but on August 4, 1933 he found that the work had been completed. The nature of the hut in question is not stated and must be gathered from a passage in the Municipal Magistrate's judgment stated hereafter. These proceedings were taken by the Calcutta Corporation on the complaint of

the District Surveyor on November 4, 1936, and the petitioner was summoned to show cause why an order should not be made under Sec. 363 Municipal Act of 1923 directing that the work of all erection or re-erection of the building done at premises No. 4 Wellesley 2nd Lane or so much of the same as has been unlawfully executed should be demolished or altered by the Corporation of Calcutta at his expense on the ground that there had been re-construction of a one storeyed hut without sanction. The Municipal Magistrate states in connection with the erection of the hut that the evidence shows that

"new *sal* posts were fixed, new bamboo rafters were placed on the roof frame and new bamboo walls were provided on all sides. To provide the new roof frame on new *sal* posts, the old roof frame must have been removed altogether. This work clearly constitutes an act of re-construction."

and on that basis he has made the order for demolition. Under Sec. 363 he may, in a case of this kind, make such an order if there is erection of any new building or there has been an alteration of or addition to any building contrary to the provisions of the Act. "New building" is defined by Sec. 3, sub-Sec. 46 of the Act. It states :

"The expression 'new building' means and includes:

(a) any building erected from the ground upwards after the commencement of this Act;

(b) any building which, having collapsed or being demolished or burnt down for more than one half of its cubical extent, is erected wholly or partially after the commencement of this Act, whether the dimensions of the re-erected building are the same as those of the original building or not ;

(c) any hut which is converted into a masonry building after the commencement of this Act; and

(d) any building not originally constructed for human habitation which is converted into a place for human habitation after the commencement of this Act;

Explanation.—Sub-cl. (b) applies whether more than half the cubical extent has collapsed or been demolished or burnt down at the same time or at different times."

The learned Magistrate has not found in this case whether there has been erection of a new building within the meaning of the Act or not. His mind does not appear to have been directed to the evidence which is necessary to establish that fact and it is impossible for us to say on the evidence whether there has been erection of a new building or not. Alterations in a building suggest change of its character or position. The learned Magistrate does not seem to have directed his mind to that question either. Nor does the learned Magistrate seem to have directed his mind to the question whether there was an addition to the building. The evidence does not show that there was. What the learned Magistrate has done is to order demolition of the building on the ground that there has been a re-construction of it. The word 're-construction' may mean any one of a number of things. But the fact that there has been a re-construction does not give the Magistrate a right to order demolition in a case of this kind, unless there has been erection of a new building or alteration of or addition to the existing building. The learned Magistrate has not found, as I have said, any erection of a new building or any alteration of an old building or any addition to a new building. Consequently, in my opinion, the order of the learned Magistrate cannot be sustained. It is essential that the provisions of the Municipal Act should be enforced in the interest of public health. At the same time it is necessary that they should be enforced according to law. The result is that the Rule is made absolute.

Bartley, J.—I agree.

M.

(8 c.) A. I. R. (1939) Cal. 304 : 3 C. W. N. 392 ; Ind. Rul. (1939) Cal. 885 ; 181 I. C. 990

Criminal Revision Petition No. 804 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

16th December, 1938.

Sheikh BADAL ALI.

v.

EMPEROR.

Cr. P. Code Act (V of 1898) Sec 539-B—Memorandum—Local inspection—Evidence of identification.

Under Sec. 539-B, Cr. P. Code, that local inspection may be held for the purpose of properly appreciating the evidence. The Magistrate had to determine whether he was prepared to accept the evidence of identification, the defence being that the case was one of mistaken identity.

Held—That the human memory being what it is, it is very difficult to place any reliance upon what Magistrate found, unless a memorandum has been made almost immediately.

The facts appear from the Judgment.

Mr. *S S. Mukherjee*—for the Petitioners.

Mr. *D. N. Bhattacharjee*—for the Crown.

Henderson, J.—The petitioner who is a constable attached to the Calcutta Police has been convicted of extortion by the learned Chief Presidency Magistrate. He then obtained this Rule on grounds Nos. 1 and 4 attached to the petition. At the hearing Mr. Mukherjee stated that ground No 1 was based upon a misapprehension and he only pressed ground No. 4 which is in these terms:

"For that the order complained of is based on inadmissible evidence, *e. g.*, the Magistrate's experiment and the Police report."

It would have been simpler to say that the Magistrate had contravened the provisions of Sec. 539-B, Cr. P. Code. What happened was this: The Magistrate had to determine whether he was prepared to accept the evidence of identification, the defence being that the case was one of mistaken identity. He visited the spot one evening and came to the conclusion that there was sufficient light to enable anydody to mark closely the features of a stranger. Now it is laid down in Sec. 539-B, Cr. P. Code, that local inspection may be held for the purpose of properly appreciating the evidence. It is also laid down that the Magistrate shall, without unnecessary delay, record a memorandum of relevant facts observed at such inspection. This learned Magistrate did not record a memorandum of the

observation upon which his decision is based. He did not note at what distance he was able to see on the night in question. We have before pointed out the necessity of complying with this provision because, human memory being what it is, it is very difficult to place any reliance upon what the Magistrate found, unless a memorandum has been made almost immediately.

This however, is a minor matter. The real difficulty is that the learned Magistrate has gone beyond the scope of Sec. 539-B of the Code. He assumes that the condition of the light and atmosphere were the same on the night that he went to the spot as they were at the time of the occurrence. Unless there is evidence on the point, the whole argument must be fallacious. Then again it is very dangerous to say that because a Magistrate who might have very good sight, strongly developed powers of observation, etc., is able to see certain things, other persons, whose powers may not be so well developed, may be able to do so. Inasmuch as this local inspection has been made the basis of the conviction, the only course open to us is to order a re-trail. We accordingly make the Rule absolute, set aside the conviction of the petitioner and the sentence passed upon him and direct that the petitioner be re-tried by some other Magistrate. The petitioner must surrender to his bail.

Bartley, J.—I agree.

M.

(s. c.) A. I. R. (1939) Cal. 327 ; 43 C. W. N. 388 ; 181 I. C. 955 ; 11 Ind. Rul. (1939) Cal. 875.

Criminal Revision No. 1099 of 1938.

Present :—BARTLEY AND RAU. JJ.

8th February, 1939.

EZEKIEL EPHRAIM EZEKIEL and another.

v.

EMPEROR.

Bengal Excise Act (V of 1909) Sec. 63, Sec. 63 (1) (2) confiscation under Sec. 64 (1)—Cr. P. Code Sec. 517—Illicit liquor—Possession of—Excise offence liable to confiscation.

Held—That the true construction of Sec. 64 (1) under the Bengal Excise Act, the Magistrate who tries the case has power to order confiscation of

anything in Bengal which is liable to confiscation under Sec. 63, whether it is within or without the District where the case is tried.

The facts appear from the Judgment.

Messrs. *C. Nead, S. C. Talukdar* and *S. K. Bhattacharjee*—for the Petitioners.

Messrs. *A. K. Basu* and *Biraswar Chatterjee*—for the Crown.

Rau, J.—In this Rule the District Magistrate of the 24-Parganas has been asked to show cause why the order of confiscation passed by the Deputy Magistrate of Alipore in the Gariahat Excise Conspiracy Case in respect of certain stocks of liquor at 4, Lindsay Street, 46, New Park Street, and 17, Mangoe Lane (including the "Excise Bond") and the "Customs Bond" should not be set aside. In Revn. No. 1100 of 1938 (J.E. GUBBEY v. EMPEROR) we shall deal with the trying Magistrate's order of confiscation so far as it relates to the stock of liquor at 8, Lindsay street. In the present rule, we are concerned with that portion of the order which relates to the stocks of liquor at the other places named above. The circumstances in which the Magistrate passed the order of confiscation are briefly these: On February 14, 1938, immediately after he had delivered judgment in what is known as the Gariahat Excise Conspiracy Case (EMPEROR v. C N. NAIDU and others) an application was made before him by the Collector of Excise, Calcutta, submitting a list of articles "liable to confiscation under Sec. 63 (1) and (2), Bengal Excise Act, and Sec. 517 (1), Cr. P. Code" and praying that necessary orders of confiscation of the articles be passed. Upon this application, the Magistrate recorded an order that very day in the single word 'confiscate'. The list annexed to the application was a long one and comprised large stocks of liquor at 8, Lindsay Street (Foreign liquor shop and Bottling Godown of James Anderson & Co.) 4, Lindsay Street (Foreign liquor shop of Davidsons, Ltd.), 46, New Park Street (another Foreign liquor shop of Davidsons, Ltd.), 17, Mangoe Lane (Bottling Godown, Excise Bond, and Customs Bond of Davidsons, Ltd.), and several other places. No opportunity to show cause against confiscation was given to any party, except such opportunity as the parties concerned in the conspiracy case had during the case itself.

The petitioners in the present rule are E. E. Ezekiel and Mrs. Reemah Ezekiel. It will be remembered that the rule is

concerned with certain stocks of liquor found at various premises belonging to Davidsons, Ltd., E. E. Ezekiel claims that he is the liquidator of this company appointed at a meeting of share-holders and creditors on January 27, 1937, (about 10 or 11 months before the order of confiscation) and Mrs. Reemah Ezekiel claims that as mortgagee and debenture-holder of the company she obtained on April 11, 1938, (about two months after the order of confiscation) a decree from the High Court whereby the entire assets of the company were vested in her. E. E. Ezekiel appealed against the order of confiscation to the Additional Sessions Judge of Alipore and subsequently Mrs. Reemah Ezekiel joined in the appeal, which the learned Judge dismissed on September 22, 1938. An important point urged before us on behalf of the petitioners is that no notice was given to the interested parties before the order of confiscation was passed. To discuss this point, we shall assume, as contended in the course of argument by learned Counsel for the petitioners, that the order so far as we are concerned with it in this rule, was made wholly under the Bengal Excise Act. Now it is undoubtedly true that before a Magistrate can make an order of confiscation under Sec 64 (1) of this Act, he has to decide that the articles in question are liable to confiscation under Sec. 63. A decision necessarily implies the hearing of parties and the petitioners' grievance is that no parties were heard in this case. In ordinary circumstances the omission might have been fatal to the order but as we shall show presently facts sufficient for a decision of the question of liability to confiscation are stated by the petitioners themselves in the application on which this rule was issued. It is, therefore, difficult to argue that the omission has caused any real prejudice; and, in any event, since we have ourselves heard the petitioners very fully and since our powers in revision extend to altering or reversing the order as we think fit, any possibility of prejudice disappears.

We now turn to the admissions in the petitioners' application. Para. 3 of the application recites that on and after the first search of the premises of Davidsons, Ltd., on October 20, 1935, various suspected liquors were sampled and seized, but the large stock of genuine liquor found on the premises was allowed to be continuously sold down to the end of December 1935, after which date the genuine liquor was collected at various spots upon the premises in the Presidency Town and

remained in the control of the Excise D·parment. Paragraph 4 sets out the premises upon which liquor was originally found: these were (a) The shop and certain godowns at 3 and 4, Lindsay Street; (b) 5, Lindsay Street; (c) The Bottling and Blending Godown at 17, Mangoe lane; (d) The Customs Bond at 17, Mangoe Lane; (e) The Excise Bond at 17, Mangoe Lane. The same paragraph states that no illicit liquor was found at (b), (d) or (e), but contains the important admission that illicit liquor was found in (c) the Bottling and Blending Godown.

These two paragraphs thus contain two explicit statements: (1) that illicit liquor was found in the Bottling and Blending Godown at 17 Mangoe Lane, and (2) that at the same time or subsequently genuine liquor of considerable value was found at certain other premises of Davidsons, Ltd. There is no suggestion in these paragraphs or in the rest of the application that in the interval, if there was any substantial interval, between (1) and (2), additions were made to the genuine liquor. On the contrary, the allegation is that some of the genuine liquor was allowed to be sold before the Excise Deparment assumed control. It is the liquor of which the Excise Departmet assumed control that has been confiscated in this case. It follows therefore that the confiscated liquor formed part of the liquor which was on certain premises of Davidsons, Ltd., at the same time that illicit liquor was found in certain other premises of the same company, namely, the godown at 17, Mangoe Lane. This and certain other established facts are sufficient to enable us to decide how far the liquor is liable to confiscation under Sec. 63, Bengal Excise Act. Before going on to deal with this section, however, we should like to set out more precisely some of the evidence about the finding of illicit liquor in the bottling godown, and for this purpose, we propose to confine ourselves to what we consider the most relevant sample. In connection with charge No. 11 (unlawful transport of liquor) on which Granatstein and Naidu have been convicted in the conspiracy case, the Magistrate has found that on October 23, 1935, four tanks, three of them empty and one, namely tank No. 37, full of liquor, were found in the godown at 17, Mango Lane. A sample taken from this tank—serial No. 24 of Mr. Bartlett's Report—has been found to have contained pot still liquor made at the illicit distillery at 52, Gariahat Road. There can, therefore, be no doubt whatever

that in this gobown there was found on October 23, 1935, liquor in respect of which Granatstein and Naidu had committed an offence punishable under Sec. 46 (a), Bengal Excise Act.

Now let us turn to Sec. 63 of the Act. Under Sec. 63 (1), whenever an offence has been committed which is punishable under this Act, the liquor in respect of which the offence has been committed is liable to confiscation. Then we come to sub-Sec. (2) which provides, to mention only the relevant portion, that any liquor lawfully "had in possession along with or in addition to" any liquor liable to confiscation under sub-Sec. (1) is likewise liable to confiscation. It follows therefore that any liquor lawfully "had in possession along with or in addition to" tank No. 37 is likewise liable to cofiscation. It is immaterial who is the person in possession: all that the sub-section requires is that some person should be in possession at some point of time subsequent to the commission of an excise offence, both of the illicit liquor and also of some illicit liquor: when this condition is fulfilled, the illicit liquor is confiscated equally with the illicit liquor. The sub-section does not say that the pertion in possession need be guilty of any offence, and the proviso to the sub-section distinctly implies that in the case of liquor even the owner need not be guilty. The whole of Sec 63 is in very wide terms and it is noi difficult to imagine cases where it may operate harshly. But revenue laws are often very harsh, because revenue offences are often very profitable. Possibly, in proved cases of hardship, the Provincial Government will mitigate the rigour of the law by making special rules under Sec. 86 (14) of the Act (relating to the disposal of things confiscated under the Act) or otherwise: these, however, are extraneous considerations which can hardly affect the interpretation of Sec. 63. The section has to be construed according to its plain language. We have already stated what it says and what it does not say.

To proceed now to apply the section to the facts of this case. We have seen that an excise offence was committed (by Granatstein and Naidu) in respect, INTER ALIA, of tank No. 37; therefore this tank of liquor is liable to confiscation under Sec. 63 (1). Again, when on October 23, 1935, this tank was in the possession of Davidsons, Ltd., in the godown at 17, Mangoe Lane, the same company was at the same time lawfully in possession of the unbonded liquor which is part

of the subject-matter of the present rule, although on certain other premises. The fact that the latter liquor was on different premises from tank No. 37 is immaterial; the point is that it was lawfully "had possession" (by Davidsons, Ltd.) "in addition to" tank No 37. Therefore, the additional liquor is liable to confiscation under Sec. 63 (2). The fact that Davidsons, Ltd. (as distinct from the members or employees of the company) has not been prosecuted for or convicted of any offence in this case is, as we have already stated, entirely irrelevant to the construction of s. 63 (2). Considering the enormous profits shown to have been made in this case by the group of companies of which Davidsons, Ltd., was one, we cannot say that the Magistrate was wrong in passing an order of confiscation under s. 64 (1) rather than an order of fine.

We must now notice some of the other objections taken before us on behalf of the petitioners; we have already dealt with the point that the Magistrate did not hear interested parties before passing his order. Next in importance is the point that the Magistrate had no territorial jurisdiction to pass the order: he was a Magistrate of the 24-Parganas, whereas, it is said, the liquor confiscated was in various places in Calcutta outside that District. This argument is founded on s. 12, Criminal Procedure Code, but it overlooks s. 1 (2) of the same Code which states that in the absence of any specific provision to the contrary, nothing in the Code shall affect any special jurisdiction or power conferred by any other law for the time being in force. It follows therefore, that if any local or special Act has in any particular matter conferred on Magistrate's special powers, these powers are not to be limited by anything contained in Sec. 12 of the Code. There can thus be no question of the unfettered competence of the Bengal Legislature to confer these special powers within the province; the only question is whether, as a matter of construction, Sec. 64 (1), Bengal Excise Act, does confer them. The sub-section itself contains no territorial limitation : " when, in any case tried by him, the Magistrate decides that anything is liable to confiscation under Sec. 63. he may, etc." So far is the language of the provision is concerned, the thing liable to confiscation may be anywhere: it must, of course, be within the Province of Bengal, the Act being an Act of the Bengal Legislature ; but otherwise there is no limitation. To read

into the sub-section a limitation that the thing sought to be confiscated must be within the District for which the Magistrate has been appointed under the Code will lead to the following difficulty: Take an excise case, where the offender is known and some of the articles liable to confiscation are outside the District where the offence is triable. These cannot be confiscated by the procedure laid down in Sec. 64 (2), because that procedure is not available where the offender is known; and if we accede to the present argument, they cannot be confiscated under Sec. 64 (1) as being outside the trying Magistrate's jurisdiction. There is thus a lacuna, which can hardly have been the intention of the framers of the Act. We therefore think that on the true construction of Sec. 64 (1), the Magistrate who tries the case has power to order confiscation of anything in Bengal which is liable to confiscation under Sec. 63, whether it is within or without the District where the case is tried.

A third point taken before us on behalf of the petitioners is that the liquor in the Excise Bond and the Customs Bond at 17, Mangoe Lane, was in the dual possession of the Revenue authorities and Davidsons, Ltd. Accordingly, it is argued, that liquor cannot be said to have been "had in possession in addition to" any liquor in the sole possession of Davidsons. We accept this contention. Possession implies full and uncontrolled physical dominion and in this sense Davidsons, Ltd. was not in possession of the liquor in the Excise Bond or the Customs Bond. Liquor in bond, it must be remembered, is under double lock, one lock being a Government lock whose key is in the personal custody of the officer-in-charge. One quantity of liquor cannot be said to "had in possession along with or in addition to" another, unless the possessor of both is the same. It follows that the bounded liquor is not liable to confiscation under Sec. 63 (2), and since there is no evidence that any portion of it is illicit, it is not liable to confiscation under Sec. 63 (1), either. We must, therefore, set aside the order of confiscation so far as it relates to the liquor in the Excise Bond and the Customs Bond set out under heads D and E of the Annexure referred to in para. 6 of the petitioner's application in revision; but in other respects the Rule must be discharged.

Bartley, J.—I agree.

M.

(s c) I. L. R (1939) 1 Cal 899 ; 181 I. C 1007 ; 69 C. L. J. 99 ; A I R (1939) Cal 306 ; 42 C. W. N 310, 11 Ind Rul. (1939) Cal. 885.

Criminal Revision No. 731 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

5th December, 1938.

NEPAL CHANDRA BHATTACHARYA.

v

EMPEROR.

I. P. Code (XLV of 1860)—Sec. 153-A—Respect of a speech—Attack on the Capitalist—Promote hatred and or enmity—Cr. P. Code Sec. 342.

Held—That in order to support a conviction under Sec. 153-A, Penal Code, it must be shown that capitalists are a class of His Magesty's subjects. If the word "capitalists" is susceptible of account definition at all, that definition must be with references to a world system of economies.

It is very easy to use the word "capatalist" in making speeches ; but before such a speech can be made the basis of a prosecution under this section, it is necessary to attach some clear and definite meaning to the term.

The facts appear from the Judgment.

Messrs. *J. C. Gupta* and *S. B. Sen*—for the Petitioners.

Sir *A. K. Roy*, Advocate-General and Mr. *J. K. Mukherjee* the Public Prosecutor, 24-Parganas—for the Crown.

Bartley, J.—This Rule was issued on the District Magistrate of the 24-Parganas to show cause why the conviction of the petitioner under Sec. 153-A, Indian Penal Code, should not be set aside. Petitioner was convicted in respect of a speech made by him on November 9,1937. The charge ultimately framed against him was in effect that he promoted enmity between employers and employees, who are two different classes of His Majesty's subjects. His speech, fairly construed, is an attack on the capitalist The gist of it is this :

"The capitalist is the blood taker, or blood sucker ; labour is the blood river. The world has two creeds only, capital and labour. Labour creates : capital takes the lion's share of the product. Their relation is that of man and tiger : the one with the advantage destroys the other. Every person in the world has a right to share in its good things. That is the crux of the matter, and there can be no peace until this principle is fought for and established."

It is clear from this analysis that the speech cannot fairly be said to be an attempt to promote hatred or enmity. The language is not immoderate. The references to force are couched in homely vernacular idiom, the underlying idea clearly being that you get nothing in this world without fighting for

it. We are not, therefore, prepared to hold that on the evidence an attempt to promote hatred or enmity has been made out. In the next place, in order to support a conviction under Sec. 153-A, Penal Code, it must be shown that capitalists are a class of His Majesty's subjects. If the word "capitalists" is susceptible of accurate definition at all, that definition must be with references to a world system of economics. We are in agreement with Beaumont, C. J., when he said in MANIBAN LILADHAR v. EMPEROR (1) that :

"Capitalist is altogether too vague a phrase to denote a definite and ascertainable class so as to come within Sec. 153-A."

Literally, the common factor in such a case is accumulated wealth. Economically, the common factors are, possibly, wealth plus investment. Practically, it is impossible to define the limits of any such classification, or to say how any speech would affect any given proportion of its components. In the result this Rule must be made absolute. The conviction of the petitioner and the sentence passed on him are set aside. He will be released from jail.

Henderson, J.—I have had the advantage of reading the judgment which has just been delivered by my learned brother, and have little to add. There is no real difficulty in assessing the effect of the speech delivered by the petitioner. It is an attack upon the capitalist system. A complaint is made that under that system there is bound to be an unfair distribution of the products of labour. The audience of the speaker were then told that their only hope is to unite, if they desire to improve their condition. This appears to me a fair and natural interpretation of the words actually used. This is the explanation given by the petitioner himself in his examination under Sec. 342, Criminal Procedure Code, and I believe him. In the circumstances, it seems to me impossible to bring this speech within the terms of Sec. 153-A, Indian Penal Code. It is very easy to use the word "capitalist" in making speeches ; but before such a speech can be made the basis of a prosecution under this section, it is necessary to attach some clear and definite meaning to the term. The difficulty in doing so has been clearly expressed by the learned Chief Justice of Bombay, and I respectfully agree with what he said. But

(1) 34 Bom. L. R. 1642 ; 34 Cr. L. J. 831 ; Ind. Rul. (1933) Bom. 153 ; (1933) Cr. Cas. 183 ; A. I. R. 1933 Bom. 65 ; 141 I. C. 780 ; 57 B. 253

the difficulty does not end there; even if we are able to hold that in using the word 'capitalist' the petitioner has described a class, he has referred to world-wide economic conditions, and the class in question could not possibly be a class of His Majesty's subjects. I accordingly agree that this Rule must be made absolute.

M.

(s. c.) 11 Ind. Rul. (1939) Cal. 874.

Criminal Revision Petition No. 972 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

5th January 1939.

SEW RATAN LAL BINANI.

v.

EMPEROR.

Offence child marriage—Secs. 5 and 6 Sarda Act (XI of 1929)—I. P. Code (XLV) Sec. 211—False complaint.

Held—That this finding is not sufficient to support the conviction under Sec. 211. The elements of that offence firstly that a false charge should be brought, secondly that the person bringing it should know that there was no just or lawful ground for such proceeding or charge, and thirdly, that it should be brought to cause injury to the persons against whom it was made. The only finding recorded in present case is that a false complaint was brought.

The facts apper from the Judgment.

Mr. *L. M. Sanyal*—for the Petitioner.

Mr. *A. C. Roy Chowdhury*—for the Crown.

Bartley, J.—This Rule was issued upon the Chief Presidency Magistrate to show cause why the conviction of the petitioner under Sec. 211, Penal Code, and the sentence of imprisonment and the fine passed upon him should not be set aside. The petitioner filed a complaint before the Additional Chief Presidency Magistrate under Secs 5 and 6, Sarda Act, Act XI of 1929 against two persons who, as he alleged, were responsible for bringing about a child marriage within the meaning of that Act. This complaint was enquired into in the manner directed by Sec. 10 of the Act, and was dismissed, the Magistrate declaring that it was a false complaint. Shortly afterwards the learned Magistrate directed a complaint to be lodged under

Sec. 211, Penal Code, against the present petitioner. Now the only specific finding arrived at by the learned Presidency Magistrate, who tried the present case, is that the petitioner brought a false complaint under Secs. 5 and 6 of the Act (Act XI of 1929) before the Additional Chief Presidency Magistrate. On that finding the petitioner has been convicted under Sec. 211, Penal Code, and sentenced as mentioned above.

It is perfectly clear that this finding is not sufficient to support the conviction under Sec. 211. The elements of that offence are firstly that a false charge should be brought, secondly that the person bringing it should know that there was no just or lawful ground for such proceeding or charge, and thirdly, that it should be brought to cause injury to the persons against whom it was made. The only finding recorded in present case is that a false complaint was brought. Moreover, in view of the nature of the offence originally alleged by the petitioner to have been committed, it was essential that trying Magistrate should find definitely that either or both of the contracting parties to the marriage, which admittedly took place were infants within the meaning of the Sarda Act, that is to say, that the bridegroom was under the age of 18 or that the bride was under the age of 14. Although it would appear from the judgment that the learned Magistrate was of opinion that the bridegroom was 18 years and 6 months old and that the bride was 14 years old, there is no finding to that effect. Further, although the ages of the contracting parties to the marriage were, even according to the prosecution just above the limits prescribed by the Act, there is no discussion as to whether in the particular circumstances the petitioner could have had any just or lawful ground for believing that an offence under the Act was actually committed. On the other hand, it seems perfectly clear from the evidence that a PRIMA FACIE case of attempted extortion has been established against the petitioner.

In the result this Rule must be made absolute, the conviction of the petitioner under Sec. 211, Penal Code, and the sentence passed upon him must be set aside and we direct that proceedings on a charge of attempted extortion be taken against him before some other Magistrate. The petitioner must surrender before the Chief Presidency Magistrate.

Henderson, J.—I agree.

M.

(s c) I. L. R (1938) 2 Cal. 168 ; A. I. R (1938) Cal 375 ; 42 C. W. N. 415 ; 182 I. C. 462 ; (1939) Ind. Rul. Cal. 69.

Civil Revisions Nos. 1672, 1673 and 1708 of 1937.

Present :—S. K. Ghose and Nasim Ali, JJ.

18th January, 1938.

SAILABALA DAS JAYA

v.

NITYANANDA SARKAR.

Bengal Agricultural Act of 1935 Sec. 34—Notice given to the Court—Jurisdiction to decide whether the debtor is real.

Held—That under Sec. 34 of the Bengal Agricultural Act, the Civil Court has got jurisdiction to decide whether the debtor is a debtor within the Act but in this case no sale has taken place and the debt still exists, so that there is, in fact, a proceeding with regard to the debt which has been included in the application under Sec. 8 or in the statement under sub-Sec. (1) of Sec. 13.

The facts appear from the Judgment.

Mr. *K. K. Moitra*—for the Petitioner.

Mr. *S. C. Lahiri* (in No. 1672), Dr. *R. B. Pal* and Mr. *J. N. Das* (No. 1 in No. 1673), Messrs. *J. C. Lahiri* (No. 2 in No. 1673) and *R. N. Chaudhury* (in No. 1708)—for the Opposite Party.

S. K. Ghose, J.—Civil Revision Case No. 1708 in 1937 arises out of a money suit. The other two civil revision cases arise out of two execution cases. In all these cases notices were received by the Court for stay of proceedings under Sec. 34, Bengal Agricultural Debtors Act, 1935. The Court thereupon called upon the party concerned to prove that he was an agricultural debtor within the meaning of the Bengal Agricultural Debtors Act. In the money suit the defendant was absent. In the other two cases the applicant petitioned questioning the jurisdiction of the Civil Court to make an inquiry of that nature. In each case the Court decided that it had jurisdiction and held that the party concerned was not an agriculturist so as to attract the operation of the Bengal Agricultural Debtors Act. In that view it declined to stay the proceedings. The money suit was decreed EXPARTE. Against these orders these three Rules have been obtained.

The question which is common to all the three Rules is whether the Civil Court has jurisdiction to decide the question whether the debtor is a debtor within the meaning of the Bengal Agricultural Debtors Act. A question of a similar nature was discussed by this Bench only recently in Civil Revision Case No. 1539 of 1937 since reported in HARISH CHANDRA v. CHANDRA

NATH (1). The present three cases are sought to be distinguished on this ground that the Settlement Board has not yet come to any decision on the point and it is contended that when a Court receives notice for stay under Sec. 34, it is within its competence to decide whether the debt with regard to which the suit or proceeding is pending is such as to attract the operation of the Act and thereby give jurisdiction to the Settlement Board. The lower Court held that the Civil Court had jurisdiction relying on a remark of Edgley, J. in NRISHINGHA CHANDRA v. KEDAR NATH (2). That was a case in which the notice had been received by the Court after the property of the judgment-debtor had been sold. So that the Court was in a position to say that the proceeding then pending before it was not a proceeding in respect of the debt which had been satisfied, but that it was a proceeding in respect of the confirmation of the sale. In that view it was held that the Court had no jurisdiction to stay the proceeding on receipt of a notice under Sec. 34 of the Act. The present case, however, is different, because no sale has taken place and the debt still exists, so that there is, in fact, a proceeding with regard to the debt which has been included in the application under Sec 8 or in the statement under sub-Sec. (1) of Sec. 13, as the case may be.

It is contended that the Civil Court still has got jurisdiction to decide the question whether the debtor is a debtor within the Act or not and that it may refuse to stay the proceeding upon the view that the notice is invalid. Such contention would seem to conflit with the second part of Sec. 34 which provides that if the Board includes any part of such debt in the award under Sec. 25 or if the Board decides that the debt does not exist, the suit or proceeding shall abate so far as relates to such debt. The result therefore would be anomalous, if the Court were to proceed with the suit or proceeding in spite of the notice. The other sections of the Act would confirm the view that if the Settlement Board, as also the Civil Court, were to proceed simultaneously, the result would be anomalous and in fact the decree of the Civil Court would come to nothing. Section 35 bars execution of decrees until the application before the Board has been disposed

(1) (1938) I. L. R. Cal. 155; 42 C. W. N. 411; 11 R. C. 846; A. I. R. 1938 Cal. 369; 181 I. C. 739.
(2) (1938) I. L. R. Cal. 345; 11 R. C. 77; 66 C. L. J. 433; A. I. R. 1937 Cal. 713; 176 I. C. 330; 42 C. W. N. 1307.

of. Sec. 36 provides that a decree of Civil a Court passed in regard to a debt after the date of the application under Sec. 8 shall be treated as nullity under certain conditions. Section 20 expressly provides that if any question arises in conection with the proceedings before the Board whether the person is a debtor or not, the Board shall decide the matter. Section 40 prescribes the appellate authority whose decision shall be final under sub-Sec. (6). Sec. 42 also gives power to the Board to make a reference to the appellate officer. Section 52 saves limitation for the time during which the proceedings are pending before the Board.

These and other provisions which need not be examined here show quite clearly that the Act has set up a special tribunal for the determination of the question whether the person is a debtor or not and that determination is final. It would be inconsistent with the provisions of the Act to hold that the Civil Court is to go into and decide the same question. It seems to me, therefore, that the lower Court exercised its jurisdiction illegally in deciding that the debt was not one under the Act and that therefore the proceedings before the Court should not be stayed. In so far as Revision Case No. 1708 is concerned, it appears that the EXPARTE decree has already been made. Apparently this decree was passed in contravention of the provisions of Sec. 34 of the Act and Sec. 36 of the Act itself provides that such a decree shall be a nullity under the conditions prescribed in that section. But as far as this Rule is concerned, it will not be within the province of this Court to set aside that decree. All that can be done is to direct that further proceedings in the execution of that decree shall be stayed. To that extent the Rule will be made absolute in C. R No. 1708. In the other two cases, the orders of the lower Court will be reversed and the Rules will be made absolute. There will be no order as to costs in these Rules.

Nasim Ali, J.—I agree.

M.

(s. c.) 12 Ind. Rul. Cal. 43.

Appeal No. 1434 of 1936.

Present :—S. K. Ghose and Patterson, JJ.

5th July, 1938.

SATISH CHANDRA ROY CHOWDHURY and another.

v.

RAMPADA CHATTAPADHYA.

Account stated—Essence of—Document showing realisation and remittance and a balance struck on the debit side—No express acknowledgment to pay but containing admission as to correctness—Indian Contract Act, Sec. 25—Limitation Act Sec. 19, and Art. 64.

Where a document, drawn up by an officer of the plaintiff from the account books of the defendant, contains items showing realisations yearly made by the defendant as credit against remittances yearly made as debit and then there is a balance struck showing the amount on the debit side and balance this there is an entry "I admit and accept as correct" signed by the defendant, but containing no acknowledgment to pay :—

Held—That this is not a case of an account stated. The essence of an account stated is the fact that there are cross-items of account and that the parties mutually agree the several amounts of each and by treating the items on the other side pro tanto, go on to agree that the balance only payable.

Appeal against the decree of the Sub-Judge of Rajshahi.

The facts appear from the Judgment.

Messrs. *K. K. Maitra* and *A. C. Roy*—for the Appellants.

Messrs. *J. M. Chowdhury* and *R. N. Chowdhury*—for the respondent.

Judgment.—The is a second appeal by the plaintiffs in a suit for money due upon a HISAB. The plaintiff's case is that the defendant worked under him as a Tahisldar during the period 1326 to 1334 B. S. For the realisations of that period, the defendant signed a document admitting liability to the extent of Rs. 1,291 odd. The plaintiffs based their claim upon this document. The defendant pleaded that he signed the document under undue influence and coercion. The Courts below have agreed in negativing this defence. The defendant also pleaded limitation. The Courts below have agreed in accepting this defence and so dismissing this suit. Hence this second appeal. The aforesaid document Ex. 1 contains items showing relisations yearly made by the defendant from 1326 to 1334 B. S. as credit againt remittances yearly made as debit. Then there is a balance struck showing the amount as Rs. 1,292-1-8½ g. on the debitside. According to the evidence shown to us this amount was drawn up by an

officer of the plaintiffs from the account books of the defendant. Below this there is an entry "I admit and accept as correct" which is signed by the defendant, Rampada Chatterjee, and dated CHAITRA 31, 1338 B. S. corresponding to April 13, 1932. The present suit was filed on April 17, 1935. The first point taken by the plaintiff appellants is that the aforesaid account is an account stated and therefore the suit is governed by Sec. 64, Limitation Act. Now even if this plea is correct, the suit would appear to have been filed more than three years after the date on the account. The learned Advocate for the appellants at first contended that limitation must run form the date of the demand and refusal, but this is not borne out by the language of Art. 64, Limitation Act. He next contended that April 13 to 16, 1935, were holidays. This matter was not raised in the Courts below. However the learned Advocate for the respondent has pointed out that Tuesday, April 16, 1935, was not a holiday and therefore the argument for the plaintiffs fails. Further it is pointed out by the learned District Judge that the accounting itself cannot be held to be valid in view of the fact that all the items in Ex. 1 were time-barred at the date of the account.

Turning to the question as to whether the document Ex. 1 represents an account stated, the learned Advocate for the appellants has relied strongly on the cases in E. R. SIQUEIRA v. G. H. C. NORONHA (1) and FIRM BISHUN CHAND v. GIRDHARI LAL (2). In the former case it was pointed out that there were two forms of account stated, one of which is an account which contains entries on both sides, and the parties have agreed that the items on the one side should be set against the items on the other side and the balance only should be paid. It is under this description that the document Ex. 1 is sought to be brought and the contention is that the facts are very nearly similar to those which are found in FIRM BISHUN CHAND v. GIRDHARI LAL (2). But the similarity is really little. In the reported case the account was drawn up by the creditors in

(1) (1934) M. W. N. 708 (P. C.) ; 59 C. L. J. 494 ; 67 M. L. J. 103 ; 7 R. P. C. 30 ; 11 O. W. N. 997 ; 40 L. W. 12 ; 36 P. L. R. 57 ; A. I. R. 1934 P. C. 144 ; 151 I. C. 90 ; 38 C. W. N. 813.

(2) (1934) A. L. J. 623 (P. C.) ; (1934) M. W. N. 786 ; 59 C. L. J. 535 ; 67 M. L. J. 110 ; 36 Bom. L. R. 723 ; 11 O. W. N. 1003 ; 40 L. W. 71 ; 6 R. P. C. 166 ; 61 I. A. 273 ; 56 A. 376 ; A. I. R. 1934 P. C. 147 ; 150 I. C. 6 ; 38 C. W. N. 561.

their own account book and below the entry there was a writing by the debtor containing a statement that the sum as found was due after adjustment of account. It was pointed out in that case that the essence of an account stated is the fact that there are cross-items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side PRO TANTO, go on to agree that the balance only is payable. This does not appear to have been the case in the present suit. The judgment of the trial Court shows that the plaintiffs made an attempt to show that in fact the pay of the defendant after 1334 B. S. and dues from him after that year were taken into consideration and both agreed to give up these claims, but that this is contradicted by the plaint itself. Ex. 1 contains nothing more really than a statement of account with an acknowledgment by the defendant; but there is neither agreement nor adjustment. It seems to us therefore that the Courts below were right in holding that this is not a case of account stated.

It is next contended that it is at least an acknowledgment under Sec. 19, Limitation Act. On this point the Courts below have pointed out that that section does not apply because the items of account were timebarred. In reply to this it is contended that the agency of the defendant was not really terminated in 1334 B. S. but that it continued to 1339 B. S. when the defendant was actually discharged. But the finding of fact is that after 1334 B. S. the defendant was not employed as Tahsildar but he was employed as a clerk in the Cash Department in which capacity it cannot be said that he was an agent under the plaintiffs. On this finding it must be said that Sec. 19, Limitation Act, does not help the plaintiffs. Next it is stated that at least there is a promise to pay under Sec. 25 (3), Contract Act. But, it has been held that such a promise must be an express promise which is absent in the present case : SASHIKANTA ACHARJYA v. SONAULLA MUNSHI (1) and SATYAKEL DUTT v. RAMESH CHUNDER (2). This point also does not help the plaintiffs.

(1) 57 C. 394 ; 121 I. C. 442 ; Ind. Rul. (1930) Cal. 124 ; 33 C. W. N. 965 ; A. I. R. 1929 Cal. 444.

(2) 6 R. C. 270; 37 C. W. N. 326 ; A. I. R. 1933 Cal. 658 ; 146 I. C. 834 ; 60 C. 714.

SATISH CHANDRA ROY v. RAMPADA CHATTAPADHYA.

The last contention for the appellants is that no limitation can run against plaintiff No. 1 who is described as a lunatic represented by his wife. If there is anything in this argument, it is strange that it was not raised in either of the Courts below. There is nothing in the plaint to show as to when plaintiff No. 1 was declared to be a lunatic or that he was a lunatic at the time when the cause of action arose. The learned Advocate for the appellants has stated facts which are not in evidence or on the record, and in order to enable the parties to go into those facts, it will be necessary to have the plaint amended. There is no reason why these facts should not have been pleaded at the trial. They were not even suggested either in the trial Court or in the lower Appellate Court. In these circumstances we are not prepared to accede to the appeal being remanded in order to unable the parties to have the matter investigated. The result is that the appeal fails on all the points and is dismissed. The parties will bear their own costs in this Court.

B. K. C.

(s. c) 182 I. C. 567 ; 69 C. L. J. 95 ; A. I. R. (1939) Cal. 368.

Civil Appeal No. 175 of 1937.

Present :—SEN, J.

7th November, 1938.

KIRTIBASH MODAK and others

v.

RAKHAL MAJHI and others.

B. T. Act VIII of 1885.—Sec 148 A (1)—All landlords to be impleaded in a rent suit—If some of the parties appearing to have interest in the rent land disclaim interest, the others if can bring the suit alone.

Only some of the parties appearing as usufructuary mortgagee on the face of deed brought a rent suit against of the mortgaged land without implecating others, who, however, deposed in favour of the plaintiffs declaring that they were *benamidars* merely of the plaintiffs. The trial Court dismissed the suit, on second appeal.

Held—That in this state of evidence the plaintiffs are the only landlords and the provisions of Sec 148 A (1) have not been violated.

Appeal against the decree of the Sub-Judge of Bankura.

The facts appear from the Judgment.

Messrs. *B. C. Mukherjee* and *Muktipada Chatterjee*—for the Appellants.

Mr. *Purushottam Chatterjee*—for the Respondents.

KISHORASH MORAK v. RAKHAL MAJHI.

Judgment.—This appeal arises out of a suit for rent. The defendants are the appellants. The point for determination is fairly simple. Certain persons filed this suit for rent against the defendants on the footing that they were usufructuary mortgagees. The defendants raised various defences but only one of these defences need be considered at this stage. The defendants stated that the suit was bad for defect of parties, inasmuch as some of the other usufructuary mortgagees had not been made parties to the suit. They contended that all the landlords not having been made parties, the suit was bad as it did not comply with the provisions of Sec. 148-A (1), Bengal Tenancy Act. At the time of hearing the other usufructuary mortgagees whose names are Amulya Majhi, Ram Pada Majhi and Kali Pada Majhi appeared as witnesses and disclaimed all interest in the mortgage. They stated that they were BENAMIDARS of the plaintiff and that they had no interest in the rent payable to the plaintiffs. The taial Court, despite this admission by these persons, held that the suit was bad and dismissed it. An appeal was taken to the District Judge. The Subordinate Judge who heard the appeal has held that the plaintiffs are entitled to a decree. His judgment is by no means clear but in my opinion the conclusion at which he has arrived is correct. The persons, who, according to the defendants, should have been made parties to the suit have appeared and disclaimed all interest. The plaintiffs state that they alone were the mortgagees and that they alone were entitled to the rent. Amulya Majhi, Rampada Majhi and Kali pada Majhi support the plaintiffs. In this state of the evidence, the trial Court should have come to the finding that the plaintiffs are the only landlords, that the other persons appearing as mortgagees on the did were in fact not mortgagees and that therefore they were not necessary parties to the suit. In these circumstances, I am of opinion that the provisions of Sec. 148-A (1), Bengal Tenancy Act. have not been violated. The suit has been properly constituted as all the landlords are parties. That being so, the decree of the lower Appellate Court must be upheld and this appeal must be dismissed with costs.

(s c) 19 Ind. Rul. Cal. 1.

Criminal Revision No. 709 of 1938.

Present :—BARTLEY AND HENDERSON JJ.

1st December, 1938.

SATYENDRA NATH MAZUMDAR and another.

v.

EMPEROR.

I. P. Code (XLV of 1860) Sec. 124-A—Excited disaffection towards the Government—Alleged —Conviction.

Held—That insinuations of this character published as they were, in the form of news item, can fairly be construed as calculated to excite disaffection towards the Government established by law. Finally, if the language used could bear any such construction, in view of the immediate publication of the Government communique, a sentence of fine would be amply sufficient punishment for any offence which might have been committed.

The facts appear from the Judgment.

Messrs. *N. K. Basu, S C. Talukdar, P. K. Roy, S. K. Neogi, J. S. Bhaduri* and *H. N. Bisi*—for the Petitioners.

Mr. *D. N. Bhattacharya*—for the Crown.

Bartley, J.—The Rule was issued on the Chief Presidency Magistrate to show cause why the convictions of the petitioners who are the editor and printer and publisher of a vernacular newspaper ANANDA BAZAR PATRIKA should not be set aside. The petitioners have been convicted under Sec. 124-A, Indian Penal Code, in connection with a matter which appeared in print in the issue of the ANANDA BAZAR PATRIKA, dated March 2, 1938. The matter in question was headed "Condition of Political prisoners in Midnapore Jail. Petition for Interview with Mr. Subhas Bose". It began by saying that on February 7 last the political prisoners in Midnapore Jail had sent reminders to Mahatma Gandhi and to the Government of Bengal regarding their demand for release. No reply had been received to this. It went on to say that it is reported that the condition of the political prisoners in Midnapore Jail is quite alarming. A JAMADAR there, accompanied by a party of sepoys, threatened them that LATHI would be used on them and warned them saying, what had happened at Dacca would be repeated here also.

"A rumour has spread to the effect that a *lathi* charge was made there on the 12th or 13th.

It is reported that the political prisoners in the Midnapore Jail have to remain confined the whole day within a small, dark space. Besides that there are maltreatment and threat of *lathi* charge. Having informed the Jail

Superintendent about the threat of *lathi* charge, the political prisoners enquired wether the policy of the present Government was repressive. But no reply was received".

A Press Communique was issued denying the suggestion or allegations made in this composition. This Press Communique was published in full in the issue of the ANANDA BAZAR PATRIKA on March 9 following. The question for our decision is whether in view of the provisions of Sec. 124-A, Indian Penal Code, the publication mentioned above brought or attempted to bring into hatred or contempt, or excited or attempted to excite disaffection towards the Government established by law in British India. PRIMA FACIE, the matter complained of is publication of a false infromation and that falsity was admitted by the subsequent publication of the Government Communique. In order to support the conviction for sedition, the learned Deputy Legal Remembrancer has referred to the first sentence in the article which states . . . 'that reminders had been sent to the Government of Bengal.' He argues that the object of this opening was to idea of Government in the minds of the possible readers of the document, with the allegations of threat to and ill-treatment of political prisoners in the Midnapore Jail. It seems to us to be somewhat far-fetched to assign any such interpretation to the language used in the article. The specific allegations made are not against the Government at all. They are against a JAMADAR and against the persons whoever they may be, responsible for the accommodation assigned to the political prisoners in the Midnapore Jail. It seems to us difficult to hold that insinuations of this character published as they were, in the form of news item, can fairly be construed as calculated to excite disaffection towards the Government established by law. Finally, if the language used could bear any such construction, in view of the immediate publication of the Government Communique, a sentence of fine would, in our opinion, have been an amply sufficient punishment for any offence which might have been committed.

In the result, this Rule must be made absolute. The convictions of the petitioners and sentences passed on them are set aside. They will be discharged form their bail.

Henderson, J.—I agree.

B. P. C.

(s. c) I. L. R. (1939) 1 Cal. 345 ; 11 Ind. Rul. (1939) Cal. 871 ;
A. I. R. (1939) Cal. 333 ; 181 I. C. 898.

Criminal Revision No. 1293 of 1938.

Present :—EDGLEY, J.

22nd December, 1938.

Sreemati INDUBALA DEVI

v.

SATCHID PROSAD.

Maintenance—Cr. P. Code Sec. 488—Jurisdiction—Wife's application—Chief Presidency Magistrate jurisdiction to deal with.

Held—That the intention of the Legislative in using the words, "where he resides or is, or where he last resided with his wife" in sub-Sec. 8 of Sec. 488 of the code was to make it as easy as possible for an aggrieved person to obtain a maintenance under the provisions of this section and this expression is sufficiently wide to confer jurisdiction upon the Chief Presidency Magistrate in a case in which the opposite party wants for gain within the jurisdiction of his Court, even though he may not have a permanent residence within such jurisdiction.

The facts appear from the Judgment.

Mr. *A. N. Mukherji*—for the Petitioner.

Messrs *S. N. Mukherji*—for the Opposite Party.

Judgment—In this case the petitioner filed an application for maintenance under Sec. 488, Criminal Procedure Code, in the Court of the Chief Presidency Magistrate, Calcutta. Her case was that her husband was employed under the Bengal Home Industrial Association at No 42, Chowringhee Road, Calcutta, on a salary of Rs. 100 per mensem, and that he had neglected to maintain her. She maintained that his present total income amounted to about Rs. 300 per mensem.

The learned Chief Presidency Magistrate rejected the petitioner's application on the ground that he had no jurisdiction to entertain it. In his order he stated with reference to the construction of Sec. 488 (8), Criminal Procedure Code :

"In my opinion, 'is' refers only to cases where the opposite party may have no permanent residence, but only a temporary residence. If he has a permanent residence, the Court within which that is situated is the proper forum."

Admittedly, in this case, the opposite party has a permanent residence within the jurisdiction of the Police

Magistrate of Alipore. The only point for consideration, therefore, is whether or not the language which has been used in sub-Sec. 8 of Sec. 488, Criminal Procedure Code, is sufficiently wide to confer upon the Chief Presidency Magistrate jurisdiction to deal with an application of this sort, in view of the fact that the opposite party is employed under the Bengal Home Industrial Association within the jurisdiction of the Chief Presidency Magistrate. In my view, the intention of the Legislature in using the words, "where he resides or is, or where he last resided with his wife, in sub-Sec. 8 of Sec. 488 of the Code was to make it as easy as possible for an aggrieved person to obtain a maintenance under the provisions of this section. Obviously, it was intended in the first place to confer jurisdiction upon the proper authorities within the District in which the premanent residence or home of the opposite party happened to be situated. But, in my view, by using the words "or is" the further intention appears to have been that proceedings might also be taken against opposite parties, who had no permanent residence within the jurisdiction of the Magistrate concerned, but who might be easily found there. This expression is certainly, in my opinion, sufficiently wide to confer jurisdiction upon the Chief Presidency Magistrate in a case in which the opposite party works for gain within the jurisdiction of his Court, even though he may not have a permanent residence within such jurisdiction.

In this view of the case the order of the learned Chief Presidency Magistate, dated October 21, 1938, is set aside, and he is directed to deal with the petitioner's application according to law. The Rule is made absolute in these terms.

M.

Criminal Revision No 907 of 1938.

Present :—BARTLEY AND HENDERSON JJ.

6th December, 1938.

BHAGABAT CHANDRA MANDAL

v.

EMPEROR.

I P Code (Act XLV of 1860)—Prosecution—Sec 182—Wrong information—Police report illegal.

Held—That the petitioners' challenging the Police report and reiterating the charges made before the Police is clearly a complaint, and the Magistrate should have dealt with it under the provisions of Sec. 203, Cr. P. Code.

Under Sec. 182 I P Code cannot be proceeded with untill the petitioners' complaint has been dealt with in accordance with law.

The facts appear from the Judgment.

Mr. *A. K. Basu*—for the Petitioner.

Bartley, J.—This rule was issued on the District Magistrate of 24-Parganas to show cause why the order of the Magistrate directing the prosecution of the petitioner under Sec. 182, Indian Penal Code should not be set aside. The material facts are that the petitioner lodged an information at a Police Station charging certain persons with offences under the Indian Penal Code. The Police submitted a final report in which they asked that the petitioner should be prosecuted under Sec. 182. The petitioner was thereupon called upon to show cause why he should not be so prosecuted. In showing cause he said in effect that the Police report was false. He also asked that a judicial enquiry should be held into the case and that the Police be directed to submit a charge sheet. On this application the Magistrate directed his prosecution. The procedure adopted was clearly wrong. The petitioner's challenging the Police report and reiterating the charges made before the Police was clearly a complaint, and the Magistrate should have dealt with it under the provisions of Sec. 203, Criminal Procedure Code. No such action was taken, and this procedure was clearly illegal. The case under Sec. 182, Indian Penal Code cannot be proceeded with until the petitioner's complaint has been dealt with in accordance with law. This Rule is accordingly made absolute. The order made by the learned Magistrate is set aside and he

is directed to deal with the petitioner's complaint dated April 21, 1938 in accordance with law.

Henderson, J.—I agree.

M.

(s. c) I. L. R. (1939) 1 Cal. 322 ; A. I. R. 1939 Cal. 340 ; 182 I. C. 253. 12 Ind. Rul. Cal. 32.

Criminal Revision Petition No. 739 of 1938.

Present :—BARTLEY AND HENDERSON JJ.

9th December, 1938.

KANGALI MOLLA

v.

EMPEROR.

Cr. P. Code (Act V of 1898) Sec. 203—Nazari *petition against Police report*—*I. P. Code (Act XLV of 1860)*—*Conviction.*

Held—That petition, loosely called a *narasi* petition has been actually dismissed by the Magistrate under Sec. 203, Cr. P. Code and it is therefore finished and done with, and there is nothing further to prevent the trial proceeding.

The facts appear from the Judgment.

Mr. *A. C. Roy* for Mr. *S. C. Lahiri*—for the Petitioner.

Mr. *D. N. Bhattacharya*—for the Crown.

Henderson, J—This is a rule calling upon the District Magistrate, Rajshahi, to show cause why the conviction of the petitioner and the sentence passed on him under Sec. 182, Indian Penal Code, should not be set aside on grounds Nos. 1 and 2 attached to the petition. These two grounds are really tautological and the complaint made by the petitioner is that he ought not to have been put on his trial while the NARAZI petitions filed by him were undisposed of. We have already, in dealing with another case this morning, said that there are authorties for that proposition. It would certainly be unreasonable to convict a petitioner for giving false information, when there is still a possibility that his own case might be

KANGALI MOLLA v EMPEROR.

found to be true. We have been through the record and we have found that the petition, loosely called a NARAZI petition, was actually dismissed by the Magistrate under Sec. 203, Criminal Procedure Code. It was therefore finished and done with, and there was nothing further to prevent the trial proceeding. We may however observe in passing that inasmuch as no charge was ever brought against anybody by the petitioner, the petition filed by him was not really a petition of complaint at all.

The learned Advocate who appeared in support of this rule however relies upon a decision of Mitter, J, in SHEKANDAR MIA v. EMPEROR (1). That decision certainly supports his contention. But, with great respect to the learned Judge, we are of opinion that that case was wrongly decided. We are unable to see how, when a complaint has been dismissed, it can be made a ground for holding up other proceedings. The learned Judge seems to have been influenced largely, because he thought that the accused persons would be prejudiced. In our judgment no question of prejudice can arise. If the accused person was satisfied with the order dismissing his complaint he could file an application in revision, and possibly get it set aside and a further enquiry ordered But when he does not do so, no question of prejudice can arise. With great respect to the learned Judge, he was in effect deciding an application against an order of dismissal rather than an application against a subsequent conviction and sentence. We accordingly discharge this Rule.

Bartley, J.—I agree.

M.

(1) (1933) Cr. Cas. 1000; 34 Cr. L. J. 1077; 6 R. C. 143; A. I. R. 1933 Cal. 614; 145 I. C. 824; 37 C. W. N. 399.

(s. c) A. I. R. (1939) Cal. 327 ; 43 C. W. N. 388 ; 181 I. C. 918 ;
11 Ind. Rul. (1939) Cal. 872.

Criminal Appeal No. 504 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

4th January, 1939.

RADHA BALLAV PAL and another

v.

EMPEROR.

I. P. Code (XLV of 1860) Sec. 420 and Sec. 120 B—Conspiracy—Cheating—Gambling—Not guilty—Conviction—Appeal.

Held—That an offence either of conspiracy to cheat or of substantive cheating can possibly be made out in the present case, and as a matter of fact that the society was actually registered under that Act. The representation is not a false representation.

The facts appear from the Judgment.

Messrs. *S. C. Talukdar, C. Nag* and *P. C. Kar*—for the Appellants.

Mr. *D. N. Bhattacharjee*, Deputy Legal Remembrancer—for the Crown.

Bartley, J.—The appellants in this case—Radha Ballav Pal and Ram Chandra Shee—have been convicted under Sec. 420 read with Sec. 120-B, I. P. Code, and on seven separate counts under Sec. 420, I. P. Code. They have been sentenced under the conspiracy charge to imprisonment and fine. The case against the appellants arose from a scheme of so-called insurance launched by what was known as Bharat Circulating Society. This society published widely in the press and elsewhere what is called a new attractive scheme which will confer money benefits on the policy-holders in the shape of twelve times the money each one had contributed. The main points of what may be called the prospectus were as follows :

"On receipt of Rs. 5 only the company will issue an acknowledgment receipt and will register the payee as one of the policy-holders. The company will issue two fresh policies of the same value covering the original policies. In this way circulation will be going on by the issue of fresh policies. The company expects that the number of policies will be multiplied more and more and that once benefited, the policy-holders will not hesitate to renew their applications over and over again thus ensuring limitless prospect of expansion and thereby it is expected that no difficulty will be experienced for payment to the policy-holders in the manner stated above.

The first payment will be one after the expiry of sixty days from the date of payment, and the payment will continue for twelve months. Thus each policy-holder will get Rs. 60 in fourteen months."

This original scheme was supplemented by the issue of two other kinds of policies. They were known as the 'B' and 'C' schemes. Under the 'B' scheme, an investment of Rs. 5 brought in a sum of Rs. 30 in six monthly instalments. Under the other scheme a policy of Rs. 5 brought in Rs. 15 within three months. Numbers of people were induced to invest sums of money in the scheme and numbers of agents were employed on lavish terms as to commission and bonus to popularize it. It has been found by the learned Magistrate that a number of original investors were re-paid and indeed the direct evidence in this case established that out of Rs. 91,000 realized from the public Rs. 45,000 was paid out to investors. The further findings of the learned Magistrate are that a few minutes of intelligent consideration of the various schemes put forward by the society is enough to show anybody not of subnormal intelligence that the scheme is bound to fail. It appeared too absurd according to the learned Magistrate for these schemes to work with any success; but there are always to be found among the general public large numbers of gullible and stupid people ready to risk small sums of money in wild-cat schemes in the expectation that the promises made will be fulfilled and they will get rich quickly. Many of them hoped in this case that at any rate, even if the schemes ultimately broke down, this would not occur until their dues had been repaid. The learned Magistrate further found that so far as the general public, who purchased the policies, was concerned, it may be said that some of them did so, because they were too obtuse to realize the weakness of the schemes which were advertised, while others were actuated by a wild hope that somehow their own money might be repaid to them with the promised profits before the crash came.

In view of these findings of fact it seems to us to be extremely difficult to hold that an offence either of conspiracy to cheat or of substantive cheating, can possibly be made out in the present case. The charges framed against the appellants were firstly, that they were parties to a criminal conspiracy to commit an offence of cheating by deceiving the unwary members of the public and thereby dishonestly inducing them to deliver sums of money amounting to Rs. 5 or multiples thereof, as purchase

price of the policies promised to be issued under the schemes "A", "B" and "C" aforementioned The subsequent charges of cheating were with regard to a number of items of cash said to have been delivered by various people in consequence of the deceit consisting of representations and conduct specified in the conspiracy charge. These overt acts were stated to be the starting of a bogus company known as the Bharat Circulating Company; the circulation of literature containing misleading statements, the appointments of ag-nts and payments to investors, purporting to be in accordance with the terms of the original policies. I refer to this matter for the purpose of emphasizing that the prosecution did not and do not rely, for the purpose of bringing home the specific charges of cheating to the appellants, upon any deceitful representation said to have been made to any of the depositors beyond what is contained in the original prospects. We have found in the evidence a statement as to certain representations made by the appellants to would be depositors which, if accepted as true might possibly support a specific case of cheating in respect of the person to whom they were said to have been made. But, as no reliance has been placed upon that evidence, we are not further concerned with it.

In order to establish the charge of cheating, the prosecution are bound to show that the original prospectus itself, Ex. 4 in the case, contains such false representation as are calculated to, and actually did deceive the prospective investors and thereby fraudulently and dishonestly induce them to invest money in the company and that as a result thereof it was wrongly lost to particular investors. Now on a fair reading of the prospectus itself it cannot possibly, we think, be held that it contains any such fraudulent and deceitful representation. The first point taken in connection with it is that the Society is described as Government Registered No. 5934, registered under Act XI of 1932. It appears, however, as a matter of fact that the Society was actually registered under that Act. The representation is, therefore, not a false representation. Next the prospectus sets forth that on a receipt of Rs 5 the company will issue an acknowledgment receipt and register the payee as a policy-holder. It will then issue further two fresh policies of the same value covering the original policies. In this way circulation will be going on by the issue of fresh

policies. The company expects that a number of policies will be multiplied more and more and that no difficulty will be experienced of payment to the policy-holders in the manner stated above.

The representation thus made undoubtedly is that the investors will be paid from the money provided by other investors. However absurd such a representation may be, it can hardly be said to amount to a false representation within the meaning of Sec. 415, I. P. Code, and even if such can be the case, the findings of the learned Magistrate in the Court below militate against the view that anybody could really have been deceived by the terms of the prospectus. It appears to us that the proper view to take of the present case is that it is one of those snowball schemes which was speculative in the highest degree and probably unworkable. It was not dishonest or fraudulent in the sense that it either represented to the public something which was not true or concealed from them something which should have been disclosed. We are not prepared to hold that any appeal to the gambling instinct of humanity must PER SE amount to cheating, and in the present case, we are not satisfied that the elements of the offence have been made out. In this view of the matter, the present appeal must be allowed, the conviction of the appellants and sentences passed upon them must be set aside and they will be acquitted and discharged from their bail.

Henderson, J.—I agree. The difficulty in establishing the charge as framed in this case is illustrated by the way in which the prosecution was conducted. Exhibit 4, the prospectus, is the only evidence upon which a charge of conspiracy could be based. We have read that document and it does not purport to put forward anything more than a gambling scheme; the element of uncertainty being found in the time, the scheme would be able to run. The prosecution has not been able to produce any single witness who purchased a ticket as a result of reading this prospectus and who is in a position to establish that he had been cheated. All that the evidence amounts to is that the witnesses would not have taken tickets if they had known that they were going to lose. That of course applies to every gambling transaction.

The only element which could amount to cheating is to be found in the depositions of some witnesses with

regard to subsquent interviews which are said to have taken place with the appellants in the office of the company. For example, P. W. No. 20, Jitendra Nath Ghose a Pleader of Alipore Court after reading the prospectus went to the company's office. He solemnly says that he was told by the appellants that the Government had guaranteed to pay off the money due on any policy. Of course, if this evidence is true, the appellants were guilty of a specific act of cheating. But inasmuch as no such specific charge was framed, I can only suppose that the prosecution themselves do not attach the slightest weight to it. Not merely was this witness severely shaken in cross examination, but it is quite incredible that a Pleader would believe such a silly statement. There can be no doubt at all that this evidence is all false and I do not regret that no charge was based upon it. The case really lies within a very narrow compass and rests solely upon the question whether there is any element of deception in Ex 4. I can only say that there is nothing in the document itself or in the evidence of any of the witnesses to support such a conclusion.

M.

(s. c.) I. L. R. (1939) 1 Cal. 325 ; A. I. R. 1939 Cal. 274 ; 182 I. C. 258 ; 43 C. W. N. 360 ; 12 Ind. Rul. Cal. 38.

Criminal Reference No. 198 of 1938.

Present :—EDGLEY, J.

13th December, 1938

KALI CHARAN SARDAR

v.

ADHAR MANDAL and others.

The aggregate combined sentences do not exceed Rs. 50—Cr. P. Code (Act V of 1898) Sec. 415—If appeal lies—Secs. 413 and 414.

Held—That Sec. 415 Cr. P. Code, allowed an appeal not only when punishments of different kinds were combined but also in the case of the combination of punishments of the same kind.

Held again—That there can be no appeal in which the aggregate sentences does not exceed Rs. 50 under Sec. 415 Cr. P. Code provides that an appeal

may be brought against sentences referred to in Secs. 413 and 414 by which any two or more of the punishments mentioned therein, are combined.

The facts appear from the Judgment.

Mr *K. B Bagchi* for Mr. *Viswanath Naskar*—for the Applicant.

Judgment.—In this case the petitioners were convicted by the Sub-Divisional Magistrate of Satkhira under Secs. 147 and 323, I. P. Code, and were sentenced to pay fines of Rs. 10 each, or in default, to suffer rigorous imprisonment for 10 days under each of those sections. An appeal was preferred against this decision to the Sessions Judge of Khulna. From his letter of reference it appears that the learned Judge was doubtful whether an appeal actually lay to him or not with regard to this matter. He therefore decided to treat the appeal as a petition for revision and he has referred the case to this Court with a recommendation that the sentence passed upon the petitioner should be set aside.

The first point for decision in connection with this matter is whether or not an appeal lay to the Sessions Judge against the order passed by the Sub-Divisional Magistrate of Satkhira. The only ground upon which it could be held that an appeal lay to the learned Judge would be to hold that an appeal lies under Sec 415, Cr. P. Code, when two or more non-appealable sentences of fine are combined. There is a decision of the Oudh Chief Court in favour of this proposition, namely MAKRAND SINGH v. GANGA, (1) in which it was held that Sec 415, Cr. P. Code, allowed an appeal not only when punishments of different kinds were combined but also in the case of the combination of punishments of the same kind. A different view was taken in this Court with regard to this matter by Mitter, J. in NAWABALI HAJI v. JOINAB BIBI (2) in which the learned Judge held that the words "a sentence of fine" in Sec 513, Cr. P.Code, must be held to include the cases where the aggregate sentence does not exceed a fine of Rs. 50. It would follow therefore according to the view held by Mitter, J. that there can be no appeal in which the aggregate combined sentences do not exceed Rs. 50; with this view I agree. Section 415, Cr. P. Code, provides that an appeal may be

(1) 10 R. O. 114; 1937 O. L. R. 547; 13 Luck. 618; 1937 O. W. N. 1088; A. I. R. 1937 Oudh 524; 171 I. C. 337; 38 Cr. L. J. 1062.

(2) 59 C. 1131; 138 I. C. 720; A. I. R. 1932 Cal. 551; (1932) Cr. Cas. 551; 33 Cr. L. J. 704; 36 C. W. N. 407; Ind. Rul. (1932) Cal. 525.

brought against any sentences referred to in Secs. 413 and 414 by which any two or more of the punishments mentioned therein, are combined. The punishments mentioned in Secs. 413 and 414 are imprisonment and fine. In this connection it is significant that in Sec. 414. Cr. P. Code, as the section stood before it was amended in 1923, another punishment was also mentioned, namely whipping. To my mind the combination of punishments which is contemplated by Sec. 418 of the Code as these sections now stand after the amendment of 1923, refers to a combination of the punishments of imprisonment and fine, but this section, in my opinion, can have no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50.

The learned Judges who decided MAKRAND SINGH'S CASE (1) cited above, refer to the difficulty created by the presence in Sec. 415 of the Code of the words "two or more" when only two punishments are mentioned in Secs. 413 and 414. In my view the presence of these words in the section must be due to the fact that at the time when the Amending Act of 1923 was passed and sentences of whipping were made appealable, the necessity of making slight consequential amendment in Sec. 415 escaped the notice of the Legislature. The fact remains, however, that as the sections now stand, two punishments are mentioned in Secs. 413 and 414, viz., the punishments of imprisonment and fine and as pointed out above, Sec. 415, I think, only refers to a combination of those particular punishments. In this view of the case, I do not consider that an appeal lay to the learned Sessions Judge. Therefore he had no option but to refer this case to this Court The reference is accepted for the reasons set forth in the letter of the Sessions Judge, dated November 14, 1938. The conviction and sentences passed upon the petitioners are set aside. The fines, if already paid, will be refunded.

M.

(1) 10 R. O. 114; 1937 O L. R. 547; 13 Luck 618; 1937 O. W. N. 1088; A. I. R. 1937 Oudh 524; 171 I. C. 337; 38 Cr. L. J. 1062.

(s c.) I. L. R. (1939) 1 Cal. 471 ; A. I. R. 1939 Cal. 337 ; 182 I. C. 315 ; 43 C W. N. 443 ; 12 Ind. Rul. Cal. 39.

Criminal Reference No. 221 of 1938.

Present :—EDGLEY AND LODGE JJ.

8th January, 1939.

EMPEROR

v.

Srimati SAROJINI DE CHOWDHURY.

Cr. P. Code (Act V of 1898) Sec. 386 (1) (b)—Proviso requires the Magistrate to record—Distress warrant—Illegal.

Held—That the Magistrate is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a Police Officer.

Sec. 386 (1) (b) Proviso requers the Magistrate to record his special reasons for issuing a distress warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default, *hence* the distress warrant is illegal.

The facts appear from the Judgment.

Judgment—The material facts are as follows : One Mohanto Lall De Choudhury was convicted and sentenced under Sec 420, I. P. Code, to undergo rigorous imprisonment for one year and in addition to pay a fine of Rs. 200. In default of payment of fine, he was sentenced to undergo rigorous imprisonment for a further period of six months. The fine was not paid. The prisoner surrendered on January 22, 1938, and was released on August 29, 1938, after serving the full sentence including the period of imprisonment in default. On July 2, 1938, an order was passed for realisation of the fine by distress warrant. In execution of that warrant certain items of movable property were seized. On August 29, 1938, the wife of the prisoner made a claim to these properties. The matter was referred to a Sub-Inspector of Police for report. The Sub-Inspector reported against the claimant. Without further enquiry the Magistrate rejected the claim and sold the property attached. The learned Sessions Judge has taken the view that the Magistrate had no right to sell the attached property after the prisoner had served the full period of imprisonment in default, without recording the reasons which, in his opinion, rendered it necessary to direct that the fine should be so realised. The learned Sessions Judge has further observed that the Magistrate was bound to follow the procedure laid down in Or. XXI, r. 58, C. P. Code, in disposing of the wife's claim

and his failure to do so was an error of law. In support of this view, the learned Sessions Judge has relied on the ruling in HARIMAL v. EMPEROR (1). That decision is a decision of the Allahabad High Court. Sec. 386, Cr. P. Code, as it stood before 1923, made no provision for an enquiry by a Magistrate into the claims of third parties. In 1923, Sec. 386 (2) was enacted enabling Local Governments to make rules for the summary determination of claims. The decision in HARIMAL v EMPEROR. (1) is based on the fact that the Local Government had made rules under Sec. 386 (2) directing that the procedure laid down in Or. XXI, r. 58, C. P. Code, be observed in investigating such claims. The Government of Bengal framed rules in the year 1925 which are contained in Circular Order No. 6 (Criminal) of 1925. The relevant rule is 117 (4) which reads :

"If any person makes any claims in respect of the property attached, then the ownership of such property shall be determined by the Magistrate who issued the warrant, or his successor in-office or the Magistrate in charge of accounts. The services of a junior Deputy Magistrate or Sub-Deputy Magistrate or Circle Officer may be utilised, if necessary, for the investigation of such claims"

There is accordingly no necessity for a Magistrate in Bengal to follow the procedure laid down in Or. XXI, r. 58, C. P. Code; but on the other hand he is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a Police Officer. Sec. 386 (1) (b), Proviso requires the Magistrate to record his special reasons for issuing a distress warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default. It cannot, therefore, be said that the issue of the warrant in the present case was illegal or that the sale was illegal merely because reasons were not recorded for issuing the warrant. The warrant was issued before the whole of the imprisonment in default had been undergone. The law does not require that reasons should be given for selling attached property after the disposal of claims. In view of the fact that no proper enquiry was made into the claim of the wife, we accept the reference and set aside the order rejecting the claim of the offender's wife to the property attached. The Magistrate is directed to dispose of that claim according to law.

(1) 34 Cr. L. J. 847 ; A. I. R. (1933) All. 135 ; (1933) Cr. Cas. 278 ; 144 I. C. 883 ; (1933) A. L. J. 265; 6 R. A. 6 ; L. R. 14 A. 73 Cr.

(S. C.) 182 I. C. 425 ; A. I. R. 1939 Cal. 330 ; 43 C. W. N. 784 ;
18 Ind. Rul. Cal. 61.

Criminal Appeal No 494 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

9th December, 1938.

EBRAHIM MONDAL and others

v.

EMPEROR.

Cr. P. Code (Act V of 1898) Sec. 162—Police investigation—Statement—Whether can be demolish—Question of re-trial.

The statement made to a Police Officer during investigation was warranted by the provisions of Sec. 162 Cr. P. Code and as the evidence was used in the present case used to demolish the most important portion of the defence case, it must be held that its admission prejudiced the accused to such an extent that the verdict of the jury can not be upheld and hence the retrial can not be allowed.

The facts appear from the Judgment.

Mr. *Biswas Chatterjee* for Mr. *B. N. Banerjee*—for the Appellants.

Mr. *D. N. Bhattacharya*—for the Crown.

Judgment—The appellants have been convicted under Secs. 457 and 366, I. P. Code. In our opinion, the verdict cannot be sustained, because on a material point in the case the jury was allowed to consider evidence which was wholly inadmissible. It would appear that a main plank in the defence case was that the complainant was a girl of bad character. The defence witness No. 1 who was Vice-Chairman of the Local Board was actually examined to prove this point. Subsequently, however the learned Judge recalled a Police Officer who was a prosecution witness and allowed him to give evidence after consulting his case diary to the effect that no such statement had been made to him during investigation by the defence witness No. 1.

It is perfectly clear that no such use of a statement made to a Police Officer during investigation is warranted by the provisions of Sec. 162 Cr. P. Code, and as this evidence was in the present case used to demolish the most important portion of the defence case, it must be held that its admission prejudiced the accused to such an extent that the verdict of the jury cannot be upheld. That verdict, and the conviction and sentence passed thereon on the appellant, must accordingly be set aside.

The only other question is whether we should or should not direct a re-trial in the case. On a perusal of the record we find that the direct evidence on one charge consists of the statement of the woman herself; and the direct evidence on the second charge consists of the statement of the woman and her husband. We note also that the learned Judge in recording his findings expressed himself as constrained to agree with and accept the verdict of the jury. We must admit that we appreciate the feeling which led to his expressing himself in this way; and that, in view of the record in the present case, we do not consider it necessary to direct a re trial. In this view of the matter the convictions of the appellants and the sentences passed upon them are set aside. We direct that they be released and discharged from bail.

M.

(S. C.) I. L. R. (1939) 1 Cal. 471 : A. I. R. (1939) Cal. 329 ; 182 I. C. 411 ; 69 C. L. J. 186 ; 12 Ind. Rul. Cal. 59.

Criminal Revision No. 1152 of 1938.

Present :—BARTLEY AND HENDERSON, JJ.

16th January, 1939.

SUNDAR DAS LOCHANI

v.

FARDUN RUSTOM IRANI.

Discharge—Cr. P. Cod (Act V of 1898)—Secs. 253, sub-Sec. (2) and 252—Magistrate's order—Legal.

Held—That the Magistrate's power of order for discharge was legal and under the jurisdiction.

The facts appear from the Judgment.

Messrs. *N. K. Basu* and *Moni Mukherjee*—for the Petitioner.

Mr. *S. C. Talukdar*—for the Opposite Party.

Mr. *D. N. Bhattacharjee*—for the Crown.

Henderson, J.—This is a Rule calling upon the Chief Presidency Magistrate, Calcutta, and the opposite party to show cause why an order of discharge passed under Sec. 253, sub-Sec. (2), Cr. P. Code, should not be set aside. The petitioner

made a complaint on October 17, last against the opposite praty to the effect that he had committed an offence punishable under Sec. 420, Penal Code The Magistrate examined the petitioner upon oath and then directed that a warrant should issue for the arrest of the opposite party. The opposite party duly appeared on October 26, and October 28, was fixed for the hearing. On that day the Magistrate heard both sides and examined some documents ; but he did not take the evidence of the petitioner or any of his witnesses. The Magistrate reached the conclusion that the petitioner had deliberately suppressed several facts in his petition of complaint and that the complaint was a thoroughly dishonest one. He accordingly discharged the opposite party. The petitioner then obtained this rule on the ground that the Magistrate's order was made without jurisdiction. In support of the rule Mr. Basu pointed out that the procedure laid down in Sec. 252 of the Code had not been followed. He accordingly contended that the Magistrate's order was without jurisdiction, inasmuch as Secs. 252 and 253 are both selfcontained.

I am bound to say that on this view I should not be able to attach any meaning to sub-Sec. (2) of Sec. 253. Sec. 252 is not concerned with an order of discharge. The only bar in the Magistrate's way was sub-Sec. (1) of Sec. 253. Sub-Sec. (2) removes this bar. Furthermore, the orders "at any previous stage of the case" are perfectly clear It is only reasonable that an accused person should be allowed to show at any stage of the proceedings that there is no case against him; for example, he might show that there was something in the nature of a want of sanction which would render the proceedings invalid; in such a case it would be clearly waste of time to examine the complainant's witnesses. This view finds support in the decision of the case in FAZLAR RAHAMAN v. EMPEROR (1). We respectfully agree with the observations of Suhrawardy, J. in that case. Mr. Basu contended that that learned Judge gave a contradictory decision in MUKUNDA PATRA v. PURUSATTAM SHAH (2). Though there is one passage in the actual judgment which would support this view, we are satisfied that the judgment proceeded upon other grounds. The Rule was not opposed and

(1) 58 C. 346; 126 I. C. 553; A. I. R. 1930 Cal. 515 ; (1930) Cr. Cas. 859 31 Cr. L J. 1055 ; Ind. Rul. (1930) Cal. 745.

(2) (1929) Cr. Cas. 95 ; 51 C. L. J. 44 ; 120 I C. 458 ; A. I. R 1929 Cal. 479 ; 31 Cr. L. J. 128 ; Ind. Rul. (1930) Cal 42.

in showing cause, the Magistrate admitted that he could not defend his proceedings. The point at issue in this Rule was not even considered, and the grounds taken for the decision were that the reasons given for the order of discharge were quite inadequate. We can find nothing here in conflict with the views laid down by that learned Judge in the case to which I have already referred to. The result is that this Rule must be discharged.

Bartley, J.—I agree.

M.

Criminal Revision No. 1155 of 1938.

Present :—EDGLEY, J.

5th January, 1939.

SUDHIR KUMAR ROY

v.

EMPEROR.

Calcutta Police (Act IV of 1866)—Sec. 45—Common gaming house—Conviction—Purpose gambling—Onus to prove.

Held—That the onus clearly lay upon the prosecution to show that the house on which the petitioner was found was a common gaming house as defined in Sec. 3 of the Act. In order to satisfy the requirements of this section, it would be for the prosecution to show that instruments of gaming were kept or used in that house for the profit or gain of the person owing, occupying, using or keeping such house.

The facts appear from the Judgment.

Mr. *Moni Mukherji*—for the Petitioner.

Judgment—In this case, the petitioner has been convicted under Sec. 45, Calcutta Police Act (Bengal Act IV of 1866). It is said that he was found in a common gaming house which was used for the purpose of gambling in connection with horse-racing. In the case of this sort, the onus clearly lay upon the prosecution to show that the house on which the petitioner was found was a common gaming house as defined in Sec. 3 of the Act. In order to satisfy the requirements of this section, it would be for the prosecution to show that instruments of

gaming were kept or used in that house for the profit or gain of the person owing, occupying, using or keeping such house.

It is said that the petitioner was found with Ex. 2 which is a slip of paper containing certain figures and the names of race-horses and also with a sum of money in his pocket. I have examined the slip of paper; and, in my opinion it cannot be said that it fulfils the requirements of the definition of 'instruments of gaming' under Sec. 3 of the Act nor is there any evidence on the record to show that the slip in question was in fact an instrument of gaming or that the petitioner was using it for the purpose of profit or gain. Similarly, there is no evidence to indicate that the money found on the person of the petitioner was for the purpose of gambling. Having regard to the considerations mentioned above, this Rule must be made absolute and the conviction of the petitioner set aside. The fine if already paid and the money found on the person of the petitioner must be refunded.

M.

PRIVY COUNCIL.

(Appeal from the Peshawar Judicial Commissioner's Court).

Present :—LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR LANCELOT SANDERSON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

23rd May, 1939.

Khan Bahadur Mian FEROZ SHAH

v.

Honourable *Nawab* SIR MOHAMMAD AKBAR KHAN.

Indian Limitation Act—Art. 109, Applicability of—Suit on a claim for money had and received or for mesne profits—*Contrast between Art. 109 and Art 120 of the Limitation Act.*

A certain person mortgaged for ten years certain land with possession and in 1917 to the appellant. The mortgagor executed a *kabuliat* in respect of the mortgaged property for the same period on the day of mortgage. In 1920 the respondant obtained a money decree against the mortgagor and attached the mortgaged property. Thereafter Receiver was appointed to take possession of this property and possession was taken by the Receiver in 1927. In 1924 the

mortgage was renewed and a fresh lease was executed which provided for cancellation of the lease on the failure to payment and to comply with the other terms of the lease and which extended until 1933. In 1929 the appellant sued the mortgagor, the respondent and the brother of the respondent and the lessees of the Receiver for a declaration that the land was not liable to attachment and for possession by ejectment of the Receiver and the suit was decreed in appeal in April, 1933.

Thereafter in August 1933 a suit was brought against the respondent alone by the appellant for the realisation of "the sum equivalent to the price of the produce as damages which should have accrued to the appellant from the land in suit." And the sum was calculated for the period 1927 to 1933. It was also stated in the plaint that the appellant's cause of action was not that the defendant took possession against the will of the plaintiff, but that the defendant procured wrongful attachment wilfully or without caring to find out whether the plaintiff's property is attachable or not.

Held—That Art. 109 of the Indian Limitation Act applied in the present and that Art. 120 of the said Act did not apply.

Messrs. *L. Cohen*, *K. C.* and *J. M. Parikh*—for the Appellant.

Messrs. *A. M. Dunne*, *K. C.* and *W. Wallach*—for the Respondent.

Sir George Rankin.—This appeal is brought by the plaintiff from a decision (May 23, 1936) of the Court of the Judicial Commissioner for the North-West Frontier Province affirming a decree of the Subordinate Judge of Peshawar, dated March 25, 1935, whereby the appellant was awarded Rs. 8,110. The appellant complains of this sum as inadequate, partly but not solely, on the ground that a three-year period of limitation has been applied to his claim and not a six-year period under Art. 120 of the Schedule to the Limitation Act of 1908.

On March 12, 1917, one Sohbat Khan, who was the owner of a considerable area of land in the village of Sheikhu in the Peshwar District, mortgaged 1,011 KANALS 8 MARLAS of his land to the appellant and his brother. The mortgage was for a term of ten years and was a mortgage with possession, the sum secured being Rs. 44,233. Possession was not, in fact, taken by the mortgagees, but by a second document of even date the mortgaged land was leased by the mortgagees to Sohbat Khan for the same term at a rent of Rs. 1,224 per annum which was taken to represent the yearly interest on the mortgage debt. The appellant, for reasons which need not here be detailed, became solely entitled to the mortgage. On March 31, 1920, the

respondent obtained against Sohbat Khan, a money decree and thereafter applied for and obtained attachment of the land abovementioned and of certain other land. As Sohbat Khan was a member of an agricultural tribe, the sale of his land was prohibited by Sec. 16 of the Punjab Alienation of Land Act, 1900. On some date prior to June, 1927, which does not appear from the record, the Naib-Tehsildar of Charsadda was appointed by the Revenue Court to be Receiver of the land of Sohbat Khan, including the 1,011 KANALS now in question. On June 6, 1927, the Receiver applied to the Court of the Collector for a warrant of possession in order that he might lease out the land and thereby realise money on account of the respondent's judgment debt. An order for possession was granted on June 16, 1927, and on July 21, 1927, possession of the land was delivered to the Receiver. The appellant, on August 16, 1927, lodged objections against this in the Court of the Collector, but his objection was disallowed by an order dated May 17, 1928, on the ground that the appellant, though the mortgagee, was not in possession of the land; and execution was permitted to proceed, subject to any order that might be obtained in a civil suit.

It appears that in 1924 the appellant's mortgage of 1917 had been renewed at a higher figure and that a new lease of the land to Sohbat Khan was granted by the appellant for four years at a rent of Rs. 2,000 with conditions which entitled the appellant to cancel the lease in the event of failure to pay the stipulated rent or to comply with any other term of the lease. This lease by its terms extended until June or July, 1928. In July, 1928 the Receiver reported to the Assistant Commissioner of Charsadda that a proper rent for the land of which he had obtained possession would be Rs. 3,000, and prayed for sanction to the grant of a lease to four named persons in equal shares for a period of one year. This lease was sanctioned and was continued from time to time.

On April 25, 1929, the appellant sued, in the Court of the District Judge, Peshawar, Sohbat Khan, the present respondent, the lessees and the respondent's brother asking that it might be declared that the land was not liable to attachment at the instance of the respondent, and asking for possession of the land by ejectment of the Receiver. By his plaint, the appellant, among other reliefs, claimed a declaration that the relation of landlord and tenant still subsisted between himself

and Sobhat Khan. This suit, on August 22, 1929, was dismissed by the District Judge and on appeal to the Judicial Commissioner's Court was dismissed on March 8, 1930. The Judicial Commissioner held that the present appellant was not entitled to obtain a decree for possession of the land because his mortgage from Sobhat Khan was not a usufructuary mortgage, but only a simple mortgage which did not entitle him to possession of the land. The matter was taken on appeal to His Majesty in Council, and the judgment of this Board, delivered on April 11, 1933, was to the effect that the appellant's mortgage deed entitled him to enter into possession of the land, and that a decree should be made giving him possession as mortagagee of the 1,011 KANALS 8 MARLAS now in question and of a further 140 KANALS claimed in that suit.

It is a noticeable feature of the appellant's plaint in that case, that it contained no claim for damages against the present respondent in respect of the possession taken by the Receiver of the 1,011 KANALS 8 MARLAS. Indeed one of his prayers for relief was in the following terms :—

"That in the event of the relation of landlord and tenant being held to exist between the plaintiff and defendant No. 1 judgment-debtor separate proceedings with regard to his ejectment and for recovery of the share of produce in accordance with the terms of the lease deed will be taken in a Court of competent jurisdiction."

On August 2, 1933, however, he brought the suit out of which the present appeal arises. In this suit the respondent is the sole defendant and the case made against him by the amended plaint is that having obtained a decree from the Revenue Court on march 31, 1920, he applied in 1920 and in 1924 for attachment of the 1,011 KANALS 8 MARLAS aforesaid, that he had done this without reserving the rights of the present appellant; that in these proceedings the Reciever had dispossessed the appellant, and that this was an illegal act for which the respondent was liable to pay to the appellant "the sum equivalent to the price of the produce as damages which should have accrued to the plaintiff from the land in dispute." Certain sums are mentioned in the plaint as due upon the basis for the period 1927 to 1933 according to the record of crops kept by the village accountant or PATWARI. The cause of action in respect of damages was pleaded as arising both on June 10, 1927, which is said to have been the date of the attachment, and on April 19, 1933, the date of the decision of the Privy Council

Rs. 66,000 was the figure claimed "on account of price of produce including interest on account of damages." By a further pleading, the appellant stated that the plaintiff's cause of action was not that the defendant took possession of the property against the will of the plaintiff, but that the defendant procured wrongful attachment wilfully or without caring to find out whether the plaintiff's property is atachable or not.

The Subordinate Judge on December 6,1934, held that, for purposes of limitation, time did not run against the appellant until the date of the Board's judgment in 1933, that Art. 109 of the Schedule to the Limitation Act applied to the case, that the possession of the Receiver was the possession of the respondent and that it was wrongful as against the appellant. On this view he awarded mesne profits for three years prior to the date of the present plaint. The lessees from the Receiver had paid Rs. 9,000 in three years out of which Rs. 890 were allowed to Sohbat Khan for maintenance. Accordingly the learned Subordinate Judge put the mesne profits payable at the figure of Rs. 8,110.

On appeal, the Court of the Judicial Commissioner took the view that the respondent had not acted illegally, in applying for execution, but that he was in equity bound to pay to the appellant any profits which he had obtained as a result of erroneous decisions of the Revenue and Civil Courts whereby the Receiver had been kept in possession. The appellant's claim for damages was negatived as also was his claim for mesne profits as defined in the C. P. Code, but his suit was held to be well-founded in so far as it was one for profits of immovable property wrongfully received by the defendant, that is, actually received by the defendant. As such it was held to be governed by Art. 109. The learned Subordinate Judge had omitted to include any interest in the sum which he had decreed, but he had taken into account more land than the 1,011 KANALS 8 MARLAS, and upon balance a rectification of his figure would not have been in favour of the appellant. Accordingly the decree of the trial Court was sustained (May 23, 1936.)

Before their Lordships a number of contentions have been urged by Mr. Lionel Cohen in a clear and thorough argument on behalf of the appellant.

The evidence which was adduced before the trial Court to support a contention that the lease granted by the Receiver had

been granted at a rent unduly low, was of a manifestly unreliable character, and the learned trial Judge appears to have given no weight to it. It is difficult in the circumstances to see how wilful default could be imputed to the respondent in this regard, as the matter was under the control of the Revenue Court, which appears to have made careful inquiry. The sum decreed by the trial Court being sufficient to include interest in accordance with the Code, the proper amount to be awarded does not turn upon any distinction between mesne profits on the one hand and money had and received upon the other, unless the appellant can claim to recover further sums by showing that the period of limitation applicable to the case is longer than three years.

Their Lordships are not prepared to depart from a long series of decisions to the effect that Art. 109 applies to a claim for mesne profits. Whether it is necessary to regard the language of the article as limiting its application to claims to such profits as have actually been received and requiring recourse to some other article to be had where part of the sums claimed are climed on the ground of wilful default is a question which in the present case does not arise.

It was contended by Mr. Cohen on the strength of SARADA PROSAD CHATTERJEE v. SAUDAMINI DEBYA (1) that Art. 109 was inapplicable to the case by reason that the Receiver having been appointed by the Court, there was nothing wrongful in the respondent's receipt of the rents, and that accordingly Art. 120 should be applied to the present case. Their Lordships, however, are unable to appreciate how the appellant can consistently maintain that the respondents receipt of the profits was not wrongful unless he confines himself to a claim for money had and received which would fall under Art. 62. The reasoning of the case just cited appears to their Lordships to have been answered in the case of SARAJ RANJAN CHOUDHURY v. PREMCHAND CHOUDHURY (2) in which case it was pointed out that as the words in the third column of Art. 109 stood before 1908, even if the possession had been obtained under a decree of Court which was afterwards set aside on appeal, the article would have applied and the profits would have been said to have

(1) 3 C. L. J. 182.
(2) A. I. R. 1918 Cal 360 ; 27 C. L. J. 257 ; 43 I. C. 781 ; 22 C. W. N. 263.

been wrongfully received. The omission from the third column of certain words in 1908 was due to the provisions of Sec. 144 of the C. P. Code.

It remains, however, to consider whether the case of the plaintiff can be otherwise framed than as a claim for money had and received or for mesne profits. As already pointed out, the plaint in the present case proceeded partly upon the ground that the respondent's proceedings in execution were recklessly or maliciously taken. This has not been persisted in and is quite unfounded Apart from this, the illegal act charged against the respondent was that the appellant's right of possession had been interfered with from the date of the attachment, June 10, 1927, and his cause of action was said to arise upon that date, and also upon the date of the previous decision of the Board. It now appears that Sohbat Khan had been granted by the appellant a lease for four years in 1924 and that so late as 1929 and 1930 the apellant was maintaining that the relationship of landlord and tenant still subsisted between himself and Sohbat Khan. In these circumstances it is not possible to maintain that the attachment of the land or the appointment of the Receiver or the granting to the Receiver of a writ of possession in June or July, 1927, were wrongful as against the appellant. The respondent was fully entitled, so long as Sohbat Khan was tenant under the appellant, to take the interest of Sohbat Khan in execution under his decree. It does not appear that the decision of the Revenue Court dismissing the appellant's objection was in any way erroneous in its result; and though the ultimate decision in the suit of 1929 involve that Sohbat Khan's tenancy had determined prior to April 25, 1929, the date of the plaint in that suit, their Lordships are not in a position to assign a date at which the tenancy of Sohbat Khan under the appellant was duly determined by the appellant or by the effluxion of time. In these circumstances it would not be right to permit the appellant to make a new case so as to complain of a wrong, entitling him to damages, to which Art. 120 might possibly be applied. Their Lordships are not in possession of the grounds of any claim by the appellant which would not be a claim for mesne profits or otherwise specifically provided for by the schedule to the Limitation Act, 1908, and they are of opinion, upon any view of the case, that the appellant has recovered everything to which he is entitled.

FEROZ SHAH *v.* MOHAMMAD AKBAR KHAN.

It was objected by Mr. Dunne that by not including the present claim in his previous suit of 1929 the appellant, by Or. II, R. 2, of the C. P. Code, has become precluded from maintaining it now. This contention, however, raises a question of law upon which conflicting decisions have been given by the High Courts in India. As the point does not appear to have been taken at any previous stage and as it is not now necessary to decide the matter, their Lordships do not entertain this argument.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed : the appellant must pay the respondent's costs of the appeal.

Messrs. *T. L. Wilson & Co.*—Solicitors for the Appellant.

Messrs. *Stanley, Johnson & Allen*—Soltcitors for the Respondent.

B.K.C.

(s. c.) A. I. R. 1939 Cal. 386 ; 182 I. C. 870 ; 43 C. W. N. 664.

Civil Rule No. 218 of 1939.

Present :—DERBYSHIRE, C. J. AND NASIM ALI, J.

14th March, 1939.

AGENT, ASSAM BENGAL RAILWAY CO., LTD.

v.

SURENDRA CHANDRA CHAKRAVARTY.

C. P. Code Sec. 2 sub-section (e)—Public Officer—Railway Agent—Power of arrest under Railway Act—Duty of Court—Discovery of document.

Held—That an Agent of a Railway Company is not a public officer and hence he has no power to place or keep a person in confinement. It is the duty to produce the documents for the Court's inspection. Discovery of this kind should not be made other than for the *bona fide* purpose of determining the issue which is to be tried between the parties.

Appeal against the order of the Munsif Court of Jorhat.

The facts in the case appear from the Judgment.

Messrs. *D. L. Khastgir* and *S. K. Khastgir*—for the Petitioner.

Mr. *R. N. Chowdhury*—for the Opposite Party.

AGENT, ASSAM BENGAL RAILWAY v. SURENDRA CHANDRA.

Darbyshire, C. J.—In this matter the learned Munsif at Jorhat on January 17, 1939, made an order upon the Agent of the Assam Bengal Railway Company for the production in Court of certain documents. The Agent obtained a Rule against that order and the matter has now come on before us for hearing. The plaintiff in the suit, one Surendra Chandra Chakravarty was, formerly a guard on the Assam Bengal Railway and the defendant, B. Sing, a Traffic Inspector on the Railway. The plaintiff alleges that the defendant falsely and maliciously made a report concerning him to his (the defendant's) superior which was conveyed eventually to the Agent and resulted in the plaintiff's dismissal from the railway service. The plaintiff has not sued the Railway Agent for wrongful dismissal but has sued the defendant for defamation. The plaintiff has claimed the production of the documents in question from the Agent. Those documents include, according to the order made by the Judge who had got information from the plaintiff himself (a) reports of the Traffic Inspector, (b) reports of the District Traffic Superintendent or D. T. S., (c) the letter of Mr K. Cheliha with an enclosed letter of Mr. G. Sutradhar written to the Agent, (d) the reply of the Agent to Mr. K. Cheliha, (e) letter No. 12-66 dated March 9, 1937, written by Mr. Falconer of Lukwah Tea Estate to Mr. Cuffe, and (f) reply of (e) by the Agent. The plaintiff says that the production of those documents in Court is necessary in this case. How he knew that those documents were in that file can only be guessed. The Agent of the Railway Company has objected to produce the documents under Sec. 124, Evidence Act, claiming that he is a public officer and that public interest will suffer by the disclosure. It has been argued that he is a public officer by reason of the provisions of Sec. 2, sub-section (c), C. P. Code, which says that "every person who holds any office by virtue of which he is empowered to place or keep any person in confinement" is a public officer. The Agent of course is the Agent of the Railway Company which is a company run for profit subject to restriction and regulation by the Government.

It is contended on behalf of the Agent of the Railway Company that he has power under Sec. 131, Railways Act, to arrest certain persons for offences committed on the railway. It should be noted that Sec. 131 (2) states that "a person so arrested shall, with the least possible delay be taken before a Magistrate having authority to try him or commit him for

trial." It is said that that power of arrest brings him within the definition of "public officer" cited above. I am of opinion that the power to arrest which is given, even if it is possessed by the Agent, does not bring him within the definition of "public officer." To place or keep a person in confinement, in my view, connotes something more than mere arrest. Arrest connotes a check or stoppage of the activities of a person. Having regard to Sec. 50, Cr. P. Code, it would appear that a person is arrested when he is subjected to such restraint as is necessary to prevent his escape, and no more restraint. To place or keep a person in confinement connotes much more restraint than arrest. It connotes a person being surrounded with restraints so that his movements on each side are very materially limited. For those reasons I am of the opinion that the Agent is not a public officer. That being so, his claim to refuse to disclose the documents in question is invalid. It is his duty to produce the documents specified either personally or by a duly authorized agent to the Court for the Court's inspection and not for the inspection of any of the parties until the Court has decided upon their admissibility. At the same time I think it right to point out that the documents must be produced subject to all just objections as to their admissibility in evidence in this case. The learned Judge must see that such documents as are used in evidence are such as are strictly relevant and admissible according to law having regard to the issue which is raised between the parties. Discovery of this kind should not be made other than for the BONA FIDE purpose of determining the issue which is to be tried between the parties. In my view this Rule must be discharged. I hope the Judge will have regard to the warning that I have given. There will be no order as to costs in this Rule. Let the record be sent down without delay.

Nasim Ali, J.—I agree.

B.K C.

(s c) A I R 1938 Cal 419 ; 43 C. W. N 743 ; 182 I. C. 980.

Civil Rule No. 1665 of 1938.

Present :—EDGLEY, J.

23rd March, 1939.

Sm. CHARUBALA DEI

v.

BAIKUNTHA NATH JANA and others.

C. P. Code Or. XXI r. 16—Person—Interested—Non service of Notice—Sale—Whether nullity.

Held—That under the provisions of Or. XXI r. 16 C. P. Code the notices to which reference is made in that Rule are merely for the benefit of the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not continued unless the transfers and the judgment debtors had had suitable oppertunity of coming forward to contest the validity of the assignment if they wished to do so.

Appeal against the order of the District Judge of Midnapore.

The facts appear from the Judgment.

Mr. *R. N Bhattacharjee*—for the Petitioner.

Mr. *N. C. Chakravarty*—for the Opposite Party.

Judgment—This Rule is directed against the order of the learned District Judge of Midnapore dated August 20, 1938, under which he dismissed summarily an order made by the Munsif of Danton on July 13, 1938, by which a certain execution sale was set aside. The material facts with which we are concerned in the present case are briefly as follows : On August 14, 1934, a decree was obtained by opposite parties Nos. 3 and 4 against Sm. Hema Bewa, opposite party No. 9. The decree in question was not only in favour of the opposite parties, Nos. 3 and 4 but it also operated in favour of their co-sharers, opposite parties Nos. 5 to 8. It appears, however, that on September 12, 1934, opposite parties Nos. 3 and 4 purchased the interest of their co-sharers and by reason of this transfer, the entire interest of opposite parties Nos. 5 to 8 in respect of the decree, which had been passed on August 14, 1934, passed to oppposite parties Nos. 3 and 4. On April 3, 1935, opposite parties Nos. 3 and 4 instituted execution case No. 599 of 1935 against opposite party No. 9, Sm. Hema Bewa. On July 17, 1935, in the course of these execution proceedings Hema Bewa's holding was sold and was bought by the petitioner in this case, Charubala Dei. Thereafter on December 21, 1937, an application under Sec. 174, B. T. Act, was filed by opposite

parties Nos. 1 and 2 for the purpose of setting aside a sale. These persons maintained that on July 14, 1934, that is a month before the date of the rent decree against Hema Bewa, this lady had transferred her holding to them under a registered KOBALA. They therefore sought to have the sale set aside mainly on three grounds : (1) They contended that, on the date when the decree was passed against Hema Bewa on August 14, 1934, there was no relationship of landlord and tenant between opposite party No. 9 and the landlord ; (2) They pointed out that they were not parties in the rent suit or in the subsequent execution proceedings and they maintained that as Hema Bewa had parted with her interest in the holding before the date of the decree, the execution sale which was subsequently held on July 17, 1935, should not be regarded as being effective ; (3) Their third objection was to the effect that no notice under Or. XXI, r. 16, C. P. Code, had been served on opposite parties Nos. 5 to 8 and upon opposite party No. 9 Hema Bewa and, this being the case, the execution sale must be regarded as a nullity.

The sale was set aside by the learned Munsif on the third ground only and he held that the execution sale must be regarded as a nullity because no notice had been served on the transferors and upon the judgment-debtors as required by the provisions of Or. XXI, r. 16, C. P Code. The decision of the learned Munsif was affirmed on appeal by the learned District Judge. The main argument put forward in support of the order made by the Courts below is to the effect that the provisions of Or. XXI, r. 16, C. P. Code, must be regarded as mandatory and failure to comply with these provisions must, therefore, render an execution sale a nullity. In support of this argument reliance was placed upon a decision of Mukherjee, J., in SURIFA KHATOON v. ASIMANNESSA BIBI (1). In that case the learned Judge pointed out :

"The Legislature intended that the question of the validity of the assignment should be determined once and for all in the presence of the parties interested, after due notices had been served upon the judgment-debtors, and the assignors as well."

On the facts of that particular case, he held that the

(1) 11 R. C. 336 ; A. I. R. 1938 Cal. 734 ; 178 I. C. 257 ; 42 C. W. N. 949.

execution sale with which he was dealing must be regarded as a nullity. The facts of the present case are, however, clearly distinguishable form those connected with the case with which Mukherjee, J. was dealing in SURIFA KHATOON v. ASIMANNESSA BIBI (1) cited above. In the case now before us, admittedly, on July 3, 1938, opposite parties Nos. 5 to 8 who were the persons who had transferred their interest in the decree on September 12, 1934, made a statement in Court to the effect that they had in fact sold their interest to opposite parties Nos. 3 and 4 and that they had full knowledge of the execution proceedings and the subsequent sale and that they had no objection to the execution of the decree. A similar statement was made by the judgment debtor, opposite party No. 9. It therefore appears that the parties directly interested in the service of notices, under Or. XXI, r. 16, Civil Procedure Code, had expressly waived and rights which they may have had in respect of such notices. It appears form the provisions of Or. XXI, r. 16 Civil Procedure Code that the notices to which reference is made in that Rule are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so. I do not think, however, that if the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection as far as the execution proceedings are concerned, non-compliance with the technical requirements of Or. XXI, r. 16, C. P Code, would render a sale a nullity, which had been held in the course of execution proceedings in which notices under Or. XXI, r. 16, C. P. Code had not been served.

In this view of the case, I think the Courts below were in error in setting aside the execution sale on account of non-compliance with the requirements of Or. XXI, r. 16 of the Code. In any event, I do not consider that having regard to the facts of the case, opposite parties Nos 1 and 2 had any LOCUS STANDI under Sec. 174, B T. Act to apply to have the execution sale set aside. Sub-section (3) of Sec. 174 of the Act

(1) 11 R. C. 336 ; A. I. R. 1938 Cal. 734 ; 178 I. C. 257 ; 42 C. W. N, 949.

allows an application to set aside a rent sale to be made by a judgment-debtor or any person whose interests are affected by the sale. In this case admittedly opposite parties Nos. 1 and 2 were not parties to the rent suit nor to the subsequent proceedings taken in execution of the decree, which was passed on August 14, 1934. It is true that it was their case that Hema Bewa, opposite party No. 9 had transferred her interest in the holding to them a month before the decree. The fact remains, however that opposite parties Nos. 1 and 2 were not parties to this decree which on the face of it proceeds upon the assumption that her interest had not been transferred to any other person before the date of the decree. It may, of course, be possible for opposite parties Nos. 1 and 2 in any properly constituted suit or appropriate proceeding to show that, as a matter of fact, the transfer as alleged by them, had actually taken place. But, as far as these proceedings are concerned, it is quite clear that they are not affected either by the decree or by the subsequent rent sale held in executin of that decree. If, during the course of the execution procedings, opposite parties Nos. 1 and 2 are dispossessed by the decree-holders, opposite parties Nos. 3 and 4, it would, I think, be open to them to file an application under Or. XXI, r. 100, C. P. Code, and the question would then have to be decided whether opposite parties Nos. 1 and 2 were really in possession of the holding on their own account by reason of the alleged transfer to them on July 14, 1934 If so, they would normally be entitled to recover possession of the holding under the provisions of Or. XXI, r. 101, C. P. Code. I do not think, however, that on the proceedings as they stand, these persons had any LOCUS STANDI to apply to have the execution sale set aside under the provisions of Sec. 174 (3), B. T. Act.

In view of the considerations stated above, in my view, the orders of the Courts below cannot be supported and they are therefore set aside. This Rule is accordingly made absolute with costs. The hearing fee is assessed at three gold MOHURS. The proceedings in Execution Case No. 599 of 1935 should now continue.

B.K.C.

(s. c) 183 I. C. 62 : A. I R. 1939 Cal. 419 ; 69 C. L. J. 163.

Appeal No. 407 of 1937.

Present :—JACK, J.

14th December, 1938.

Srimati KAMINI DASI.

v.

HARI PADA DUTT.

Document of lease unregistered—Document purports to vary the rent—Requires registration.

The admissibility of the *Solenama* it seems clear that inasmuch as it is an agreement purporting to vary the rent reserved in a previous registered lease, it would also require registration.

Where a document purports to vary the rent, it requires registration.

Held—That in accordance with the general principles that if one wishes to vary the rent on which the land is held under a registered lease, it should be by a registered instrument.

Held again—That the previous lease was compulsorily registrable or not.

The facts appear from the Judgment.

Messrs. *P. Ghose*, *R. K. Pal* and *R. M. Bhattacharjee*—for the Appellant.

Dr. *Sen Gupta* and Mr. *Umakramdas Chakravarty*—for the Respondent.

Judgment—This appeal has arisen out of a suit for recovery of produce rent of the plaintiff's half share of the rent of certain land described in the plaint on the basis of a KABULIAT. The defence was that at the time of the execution of the KABULIAT there was a pre-existing tenancy and therefore defendant No. 1 had no right to execute the KABULIAT at the rate of rent claimed by the plaintiff. The suit was decreed at the KABULIAT rate in both the Courts. The two points raised in this appeal are, firstly, that the SOLENAMA Ex. 1 (A) was wrongly held to be inadmissible in evidence owing to not being registered, and secondly, that the rate of rent was RES JUDICATA having been decided as between the parties in a previous suit and that the admissibility of the SOLENAMA is also RES JUDICATA inasmuch as it was admitted in a previous suit between the parties. As regards the admissibility of the SOLENAMA it seems clear that inasmuch as it was an agreement purporting to vary the rent reserved in a previous registered lease, it would also require registration. If any authority is required for this, it is to be found in KAILASH CHANDRA PATHAK v. MADAN MOHAN SINGH (1). On behalf of the appellant, this case has been

(1) 173 I. C. 596 ; 42 C. W. N. 107 ; A. I. R. 1937 Cal 499 ; 10 R. C. 693.

differentiated on the ground that there the learned Judge relied upon the case in LALIT MOHAN GHOSE v. GOPALICHUK COAL CO., LTD. (1) in which the previous lease was compulsorily r gistrable, and therefore it is sought to distinguish the case on the ground that in the present case the previous lease which was a RAIYATI lease was not compulsorily registrable. It appears, however, that the general proposition that was laid down in the case in Kailash CHANDRA PATHAK v. MADAN MAHAN SINGH (2) was that where a document purports to vary the rent, it requires registration, and it seems to me to be also in accordance with the general principles that if one wishes to vary the rent on which the land is held under a registered lease, it should be by a registered instrument. The fact that the previous lease was compulsorily registrable, does not appear to me to alter the principle.

At the very last stage another point was raised, namely that in fact the Lohars were not holding under a registered lease since their lease was under the Ratis, whereas the plaintiff purchased in execution of a mortgage decree against one of their vendors and the tenancy which the Lohars held was not under a registered lease. But the whole point at issue between the parties was whether the Lohars held under a pre-existing tenancy or whether the lease terminated, and the decision in the previous suit was that the pre-existing tenancy was still existing and that pre-existing tenancy was a tenancy under a registered lease. There is, therefore, in my opinion no substance in the points raised in this appeal. The result is that this appeal is dismissed with costs. Leave to appeal under Cl. 15 of the Letters Patent is refused.

M.

(1) 39 C. 284 ; 12 I. C. 723 ; 16 C. W. N. 55 ; 14 C. L. J. 411.

(2) 173 I. C. 996 ; 42 C. W. N. 107 ; A. I. R. 1937 Cal. 499 ; 10 R. C. 603.

(P C) 18 Ind. Rul P. C. 18 ; 50 L. W. 87 ; A I. R. 1939 P. C. 138 ; 182 I C. 770.

PRIVY COUNCIL.

Appeal from the Supreme Court of the Island of Ceylon.

Present :—Lord Alness, Lord Romer, and Lord Porter.

24th February, 1939.

SIMON CHRISTOPHER JAYAWARDENE

v.

ALFRED CHRISTY JAYAWARDENE and others.

Lease—If restriction clause void or voidable—Gift if valid—Devise if valid—If suit necessary to avoid when a third party has option—Estoppel.

A lease by the Government contained a clause forbidding the lessee to transfer or deal with the lands demised by way of sale, sublease, gift or mortgage without consent of the Government. It also provided that such a gift etc. without consent will be absolutely void. It further provided that in case of breach of the covenant the lessor was to re-enter and repossess. The lease purports to have been made to the lessee his executors, administrators etc. in express terms.

The lessee made a gift of the lands demised to his four sons, there was an application for permission to donate but it was given on certain conditions which were not fulfilled. The lessee then made a will and devised the land to the appellant one or the said sons. On his death the appellant took out probate and possessed the same quielty on payment of rent to the Government as a substituted lessee. Afterwards he was dispossessed of ¾ of the lands by his two brothers on behalf of the three. He then brought a suit for quiet possession and injunction. The trial Court decreed his claim. On appeal to the Supreme Court of Ceylon the suit was dismissed. On appeal to the Privy Council,

Held—That the lease was at least voidable by the crown and the crown had avoided the attempted donations.

Held also—That the donations were void and did not operate as a valid assignment of the tenant's interest in the lease and therefore there has been no forfeiture.

Held further—That donations being void and the lease continuing in force, the tenant retained his full interest as before the gift.

Held too—That the tenant was thus capable of disposing of that interest by will, when the lease was granted to the 'lessee' which term included his executors also, and the appellant as executor is entitled to hold the lease as a permitted assign.

Held again—That the executor takes not for himself but for the devisee under the will which appoints him executor and the passing of the property through the executor to the devisee is no breach of covenant not to assign.

S. C. JAYAWARDENE v. A. C. JAYAWARDENE.

Held further—That inclusion of executor in the term lessee validates executor's function also which is to transfer the lease to some devisee even if that devisee be himself.

Held also—That if such a devise fail under the forfeiture clause in the lease, forfeiture has been waived by accepting rent from the appellant as a substituted tenant.

Held that—The attempted donation was void against the Crown, and that it was avoided by the Crown also by subsequent acts, that formerly permission to donate was refused, appellant cannot transfer to the respondents without requisite consent, therefore the respondents can claim no legal right against the appellant.

Held too—That the respondents accepted the donations with full knowledge of the forfeiture clause and they did not act upon any representation nor altered their position to their prejudice, hence no estoppel arises.

Held further—That *fidie commissum* properly constituted and accepted cannot be revoked : *Soysa* v. *Mohiden* 17 N. L. R. 279.

Held too—That a Solemnly executed and duly registered instrument must stand until set aside by a competent court.

Held further—That the donations might be valid but the property did not pass as it was not at donor's disposal.

Held also—That in this case no suit was necessary to make the crown's election affective.

Held again—That in this case the crown and not the appellant gainsaying the title no estoppel arise.

Messrs. *H. S. Hallett, K. C.* and *Stephen Chapman*—for the Appellant.

Messrs. *L. De Silva, K. C.* and *Kenelm Preedy*—for the Respondents.

Lord Porter.—The appellant in this action, who was also the plaintiff, is one of the sons of the late J. V. G. A. W. Jayawardene, Gate Mudaliyar. The first three respondents are also his sons.

The deceased man was apparently a considerable landowner in the Island of Ceylon, and amongst his other properties was tenant under the Crown by an indenture No. 29 executed on October 29th, 1919, and on February 23rd, 1920, by the respective parties, of a certain allotment of Crown land called Kajugahaudumulleduwa, Kajugahaudumullelanda and Galagodakele in Maggon Badda, Kulutara Totamune and Eladuwa village, Iddagoda Pattu, Pasdun Korale West, Kalutara District, Western Province.

S. C JAYAWARDENE v. A. C JAYAWARDENE

The lease was entered into by the Governor of Ceylon on behalf of the Crown as lessor on the one part and by the deceased man as lessee (an expression which was stated to include his heirs, executors, administrators and permitted assigns) of the other part.

The estate was to be held in perpetuity subject to the covenants and general provisions contained in the lease.

The covenants contained provisions for clearing and planting, paying rent, and the non-erection of buildings on the land. The tenth covenant must be set out in full. It read :—

"The Lessee and his aforewritten shall not sub-let, sell, donate, mortgage, or otherwise dispose of or deal with his interest in this Lease, or any person thereof, without the written consent of the Lessor, and every such sub-lease, sale, donation, or mortgage, without such consent, shall be absolutely void."

The second general provision was also important, and is as follows :—

"That if any rent hereby reserved shall remain unpaid and in arrear for the space of more than one year after the time hereby appointed for payment thereof, whether the same shall have been lawfully demanded or not, or if any breach shall be committed by the Lessee of any of the Covenants herein of the Lessee's part contained, or if the Lessee shall abandon or cease to cultivate the said land in manner provided in Part IV of this lease, or if the Lessee shall become bankrupt or compound with his creditors or if the said land or the interests of the Lessee or his aforewritten be sold in execution of a decree against him or his aforewritten, then, and in any of the said cases, this demise and the privileges hereby reserved, together with these presents, shall forthwith cease and determine, and the Lessor, his agent or agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the Lessee or his aforewritten against the Lessor for compensation on account of any improvements or otherwise howsoever."

The deceased man took possession under the lease and continued in possession until his death on January 10th 1930.

Meanwhile, in May, 1927, he was for some reason anxious to make a deed of gift of the whole or at any rate a large portion of his properties to his four sons in equal shares, and amongst those properties he desired to include the Crown lease.

Accordingly he wrote on May 16, 1927, to the Assistant Government Agent asking that permission to assign might be granted. Without waiting for the permission to be obtained, however, he executed four deeds of gift between May 27 and 30, 1927, giving one-quarter of his estates to each of his four sons. Each donation was subject to his own life estste and to each was attached a FIDEI COMMISSUM. These deeds included the Government lease amongst the properties given, and were in identical terms save in one matter. That in favour of the second respondent recited that his father had applied for and obtained the written consent of the Governor, whereas the other three recited only that he had applied for such consent.

The Government Agent did not reply until July 27th, 1927, when he asked to be furnished with a draft of the proposed deed and laid down certain conditions upon which alone permission would be granted. He ended by saying that the donee should understand that the lease was liable to cancellation for any default. The deceased man did not comply with the Government requirements but endeavoured, without success, to persuade the Government authorities that the deed was in order. When he failed in this attempt, he caused four deeds of cancellation to be prepared and apparently a draft copy was sent to the Government Agent. Finally on March 8th, 1928, the Agent returned the draft copy and wrote in the following terms :—

"Sir,

I have the honour to return the draft deed of cancellation and to inform you that the deed of gift already executed of your own accord is invalid by reason of Government Consent not having been given thereto, If you are legally advised that cancellation is necessary, no question of obtaining Government Consent arises.

I am, Sir,
Your obedient Servant,
(Signed) E. T. Dyson,
Assistant Government Agent."

The deeds were never in fact cancelled, but at the bottom of this letter is to be found the words, "Deed of Gift invalid. Son heir under the Will," but there is no evidence as to the hand by which these words were penned, and their Lordships can derive no assistance from them.

S. C. JAYAWARDENE v. A. C. JAYAWARDENE.

On October 23rd, however, of the same year, the deceased man made his will, leaving all his property, save for a gift of Rs. 3,000 to his grand-daughter, to the appellant, whom he also appointed his executor.

After the death of his father the appellant's name was entered in the Register of Rents of Government lands leased in perpetuity, as substituted lessee, and he entered into and remained in possession of the property in dispute until November 1932, when the third defendant dispossessed him. Later on, the first defendant entered into possession. Both the third and first defendants are said by the appellant to have entered into possession on behalf of the three defendants and not on his behalf. It appears from the appellant's evidence that whilst he was in possession he paid the Government rent, but that after he was dispossessed, he could not pay the entire rent and the respondents made certain payments, but there is no evidence that the Government accepted them as tenants. Indeed the payments were credited in the Government books to the account of the appellant as substituted lessee.

The respondents did not give evidence. Whether the appellant accepted the deed of gift or not, is not clear—probably he did, as he said in cross-examination, "I got a gift of one-forth share of this land. I was present when all the gifts were made. I signed as a witness to deed No. 178." This last-mentioned deed was that giving a one-fourth share to one of his brothers.

The plaintiff having been dispossessed in this way, brought the present action against the first three respondents claiming a declaration of title, that the three respondents be ejected and the appellant quieted in possession, damages, and an injunction. Inasmuch as the premises were held on a lease from the Crown he made the fourth respondent a party to the action, but claimed no relief against him.

His case was that no consent had been given to the disposition of the estate and that the purported gift passed no property either to himself of any of his brothers, because by the terms of Cl. 10 of the lease any disposition of the property without the consent of the Crown was absolutely void.

In answer the first three respondents pleaded the four gifts which they said were subject in each case to a FIDEI COMMISSUM in favour of their children, or, in default, in favour

of the lawful heirs of each of the donees; acknowledged that the appellant was entitled to a one-fourth share; pleaded the covenant in the deeds of gift by the donor that he had full authority to donate the estates thereby given and would warrant and defend the same to the donees; and pleaded that the appellant, as claiming under the deceased testator, was bound by that covenant and was estopped thereby from questioning their title.

Alternatively they said that by reason of cl. 10 of the lease the testator had no power to dispose of the property by will.

At the trial of the action both parties agreed to waive damages of all nature (if any) due to them up to the hearing, leaving the substantial issue whether the property passed by the deeds of gift or whether at any rate the appellant was estopped from denying that it had.

The District Judge who heard the case in the first instance gave judgment in favour of the appellant, but was reversed by the Supreme Court by judgment, dated December 4th, 1936.

The appellant has appealed against this decree to His Majesty in Council.

The Crown took no part in either of the Courts in Ceylon, but have attended their Lordships' Board in order to preserve their rights in case it should be held that the appellant was in the wrong and in order to give any assistance which they were able.

These being the facts, the first question to be determined is whether the purported deeds of gift of this land pass any property or not. The answer to this question depends upon the terms and effect of cl. 10 of the lease.

It is not necessary in construing the clause to determine precisely the limits of the acts prohibited by each word of the clause. Admittedly the gifts to the sons were donations. No written consent to a donation was obtained and donations are prohibited without the written consent of the lessor. Without such consent the clause declares every donation to be absolutely void.

In a series of cases where a lease has been granted upon the terms that if certain conditions are not fulfilled or are broken, it shall be "void" or "utterly void" or "null and void

to all intents and purposes," it has been held that upon a failure by the tentant to fulfil the conditions, the leases are not IPSO FACTO void but are only voidable at the option of the lessor The principle is explained in DAVENPORT v. REG (1) and the cases quoted therein in reference to English Law, and a similar principle is to be found in Roman Dutch Law See FERNANDO v. FERNANDO (2), and SILVA v. MOHAMUDU (3), in Ceylon, and BREUTENBACH v. FRANKEL (4), in South Africa. It is to be observed that in those cases it is the lease which is declared to be void, not, as in the present case, the assignment of the lease, but their Lordships, without expressing any opinion upon the question, will assume that these decisions are applicable to the latter as to the former class of case.

Even if this assumption be made, it is clear that in the present case the lessor never by word or act assented to or acknowledged the donations. On the contrary, as appears by the letter of March 8th 1928, the Government claimed that the donations were invalid.

Some misapprehension appears to have arisen in the Supreme Court as to the effect of this letter. That Court seems to have thought that despite the terms of the communication the Government by their subsequent acts affirmed the lease. In this they were mistaken. The Government affirmed the lease because of—not in spite of—their refusal to acknowledge the donations. If the donations were invalid, there was no breach of condition because there had been no dealing with the land contrary to the terms of cl. 10. If, on the other hand, the donations had been valid, notwithstanding the lessor's refusal to give its written consent, then there would have been a breach of condition such as might entitle the lessor to avoid the lease. Indeed the Government were represented at the hearing before their Lordships for the express purpose of contending in case the donations were held valid, that the right which they claimed to possess of forfeiting the lease was unaffected.

In their Lordships' view the lessee had validly contracted that any donation made by him was at least voidable by the Crown, the Crown had avoided the attempted donations, and

(1) 37 L. T. 727 ; 47 L. J. P. C. 8 ; (1877) 3 A. C. 115.
(2) (1916) 19 N. L. R. 193.
(3) (1916) 19 N. L. R. 426.
(4) (1913) S. L. R. App. Div. 39.

those donations being void, did not operate as a valid assignment of the tenant's interest in the lease and therefore there has been no forfeiture. See DOE v. POWELL (1).

If the lease remained in force and the attempted donations of the lessee were void, the tenant retained his full interest and was capable of disposing of that interest by will to whom he pleased, subject to two questions :—

(1) Did cl. 10 prohibit the tenant from disposing of the lease by will ?

(2) Whatever the position between the Crown and the lessee, could the appellant, as executor of his father, repudiate his father's gifts which had never been cancelled ?

(1) Had the lease been granted to the testator SIMPLICITER, the difficult and doubtful question whether a devise would have been a "disposal of" or "dealing with" his interest in the lease would have arisen. Even if the true view be that a devise is not a breach of a covenant not to ASSIGN—see CRUSOED BLENCOWE v. BUGBY (2),—it does not follow that it may not be a breach of a covenant not to DISPOSE OF or DEAL WITH the lease. Their Lordships, however, do not find it necessary to express any opinion on this matter.

The lease was not granted to the testator alone. It was granted to the lessee, and that expression is defined to include his heirs, executors, administrators, and permitted assigns. An executor is therefore in terms one of the lessees and is just as much entitled to hold the lease as is a permitted assign.

The true view, as their Lordships think, is expressed by Bayley, J. in DOE D GOODLEHERE v. BEVAN (3). That was a case in which the lease passed to the trustee in bankruptcy of the tenant, and it was contended that though the lease might pass to the trustee without a breach of the covenant not to assign, yet there was a breach if they, in their turn, assigned for the benefit of the estate. To this argument Bayley, J. replied :—

"Shall the assignees have capacity to take it and yet not dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their

(1) 29 R. R. 253 ; 4 L. J. (O. S.) K. B. 159 ; 8 D. & R. 35 ; (1826) 5 B. & C. 309.

(2) 2 W. Bl. 766 ; (1771) 3 Wils. K. B. 234. 16 R. R. 293 ; 2 Rose 456 ; (1815) 5 M. & S. 353.

hands to the prejudice of the creditors for whose benefit the law originally cast upon them? Undoubtedly that can never be."

So an executor takes not for himself, but for the devisee under the will which appoints him executor, and the passing of the property through the executor to the devisee is no breach of covenant not to assign. If it were not so, the naming of an executor as included in the expression "lessee" would be meaningless, since his function is to transfer the lease to some devisee even if that devisee be himself.

Their Lordships would further point out that if, as the respondents contended, "void" in cl. 10 means "voidable," then even had a devise of the estate been a breach of the condition, the Crown who have entered the appellant's name as substituted tenant and accepted rent, and who before their Lordships disclaimed any desire to interfere with his tenancy, have, if they could, waived the alleged forfeiture.

(2) If, as their Lordships think, the attempted donation was void as against or avoided by the Crown, no estate in the land could pass to the donees. The testator had not at the time of a donation any right to dispose of the land as he purported to do. Indeed permission to do so was expressly refused. Nor has the appellant now any right to dispose of it except with the requisite consent. The only rights, if any, which the donees could claim, would be some right by way of estoppel.

Their Lordships find no evidence in the record on which an estoppel could be based. Save that the first three respodents apparently accepted the donations, they neither acted upon any representation nor altered their position to their prejudice. Nor, indeed, did their father make any representation. All that he did was to purport to make a donation of a lease—a donation which by the terms of that lease he could not make and in making which he recited the lease itself.

All of the three respondents had express notice from the wording of their respective donations that consent to assign had to be obtained and it appeared from two of the donations that it had not yet been obtained. The third, namely, No. 175, did contain a recital that that consent had been obtained, but the donee Frederik Nicholas Jayawardene was not called as a witness and gave no evidence that he had been misled by the recital.

Nor does the fact that a FIDEI COMMISSUM was attached to each of the deeds of gift affect the result. It is true that a FIDEI COMMISSUM properly constituted and accepted cannot be revoked—see SOYSA v. MOHIDEEN (1)—and it is no doubt also true that a solemnly executed and duly registered instrument must stand until set aside by a competent Court; see BRYTENBACH v. FRANKEL (2) (U. S.). It was accordingly contended in the Courts in Ceylon on behalf of the respondents that the donation being solemnly executed could not be set aside, or at best could only be set aside by an application to the Court in an action for VINDICATIO or RESTITUTIO IN INTEGRUM—in Ceylon the exact form the action would not matter. See SILVA v. MOHAMUDU (3) (U. S.) PER Ennis, J. at p. 428 of (1919) 19 N. L. R.

So far as any of the property included in the donations was at the testator's disposal the argument may have force, but even if the donations are valid gifts, the question, so far as this lease is concerned, is not whether the donations are valid, but what property passes under them. In their Lordships' opinion, whatever may be the case as regards the other property, the leasehold estate, the subject-matter of the present action, could not, for the reasons given, pass to the donees.

The case differs from those in which a minor purports to grant a lease or to sell land during his minority as in SILVV v. MOHAMUDU (3) (U. S.) and BRYTENBACH v. FRANKEL (2) (U. S.). In the latter, the lease or sale is not void AB INITIO—it is voidable at the option of the minor or perhaps, as Ennis, J. expresses it, it does not bind the minor unless he ratifies it expressly or impliedly on attaining his majority. But in such cases the affirmance or avoidance of the lease or sale depends on the minor's action after he attains his majority, and in such a case, he may well be compelled to apply to the Court to have the lease or sale set aside before he can effectively dispose of his interest in the property to someone else if indeed he retains any right to deal with it at all. Where, however, the lease has, as in the present case, been disposed of contrary to the terms contained in it, and that disposition is void or has been avoided by a landlord, there is, in their Lordships' view, no room for the application of such a doctrine, even in the case of a sale

(1) (1914) 17 N. L. R. 279.
(2) (1913) S. L. R. App. Div. 390.
(3) (1916) 19 N. L. R. 426.

or other disposition for value, much less where the disposition is a gift.

In the cases quoted the option to affirm or avoid was the option of the minor himself. Had the right in the present case to avoid or affirm rested with the appellant or even with his father, this case might have had some analogy to those. But in this case the option is with the Crown, the appellant has no choice in the matter, and there seems no reason for holding that he must bring an action in order to make the Crown's election effective.

For the same reason the statement by Voet in Vol 1, Lib. VI, Tit. 1, Sec. 17 as quoted by the Supreme Court, that "the seller cannot himself vindicate property belonging to another, which has been sold by him, on the ground that he is not the owner even if he subsequently becomes the owner or is heir to the true owner", is not applicable to the present case.

Even though one accepts the view of the Supreme Court that the principle upon which the rule is founded is that no one ought to gainsay his own act, or (one may add) the act of his predecessor-in-title, yet the appellant has never gainsaid his father's act. It was the Crown who gainsaid it, and the appellant cannot hold the lease for those whose title the Crown has refused to recognise.

For these reasons their Lordships will humbly advise His esty that the appeal be allowed, the decree and judgment of the Supreme Court set aside and the judgment of the District Judge restored. The first three respondents must pay the appellant's costs of the hearing in the Supreme Court and before their Lordships' Board.

Mr. O. A. Cayley.—Solicitor for the Appellant.

Mr. Burchells—Solicitor for the Respondents.

U.K.M.

(s c) 12 Ind. Rul. Cal. 83.

Civil Appeal No 516 of 1938.

Present :—BARTLEY AND HENDERSON JJ.

11th November, 1938.

REZA ALI WAHSHAT

v.

DWARKA PERSHAD SARAF.

Pension—Papers deposited with the creditor for a loan—Creditor prosecutes the debtor for cheating him—Produces pension papers—Debtor acquitted—Debtor if entitled to return of the pension papers. Cr. P. Code Sec. 517,—Pension Act.

Pension papers of the accused were produced in Court by the complainant, with whom they were deposited to secure a loan, in support of a charge of cheating. The accused after acquittal claimed return of the papers from Court. The Court ordered return to the complainant who filed them. On notice to High Court,

Held—That the accused alone is entitled to draw pension in virtue of these pension papers and the money is protected from seizure, attachment and sequestration from any Court and hence these are not of any use to any one but the accused.

Held also—That in this case there should be a departure from common practice and the papers should be delivered to the accused.

Messrs. *N. K. Basu*, *D. N. Roy* and *Amiruddin Ahmed*—for the Appellant.

Mr. *D. N. Bhattacharjee*—for the Crown.

Messrs. *B. C. Chatterjee* and *Bireswar Chatterjee*—for the Complainant.

Bartley, J.—This is an application under Sec. 520, Cr. P. Code, made by the petitioner in reference to an order passed by the learned Chief Presidency Magistrate. The facts underlying the application are that the petitioner, a pensioner, made over his pension papers to the opposite party in connection with negotiations for a loan to be made to him by the opposite party. The grant of the loan was followed by criminal proceedings against the petitioner who was alleged to have cheated his creditor in connection with the advance of the money lent. These criminal proceedings ultimately resulted in the acquittal of the petitioner, but the pension papers which had been produced by the creditor as evidence in the criminal case appeared to have remained up to the present day in the custody of the Court. The petitioner applied to the Chief Presidency Magistrate under Sec. 517 of the Code to have the papers returned to him. The learned Magistrate was of opinion that the only order he could legally pass was that they should be

returned to the party who produced them at the trial. Against that order, the present application has been made. Under Sec 517 of the Code, the Court has jurisdiction to make such an order as it thinks fit, for the delivery to any person claiming to be entitled to possession of it any document produced in a proceeding. Any such order is subject to the revision of this Court, in virtue of Sec. 520 of the Code.

In the present case we are dealing with a particular document, to wit, a pension paper, or pension papers which have no value whatsoever to any person except the person entitled under them to draw the pension. Moreover, under the provisions of the pension Act, the money which the petitioner alone is entitled to draw in virtue of those pension papers, is protected from seizure, attachment or sequestration by process of any Court in British India at the instance of a creditor for any demand against the pensioner. It is perfectly true that in an ordinary case of property or documents with which the Court is called upon to deal, under the provisions of Sec. 517, the proper order to pass generally is that such property or such document should, in the absence of a definite finding as to the ownership, be returned to the person with whom it was found. In the present case, however, there is a marked exception to the general rule. Here there can be no question that the only person entitled to the possession of the papers is the pensioner himself, and further the only person to whom they have any value whatsoever is the pensioner himself. In the state of affairs, the common sense view of the matter is that the petitioner should be allowed to regain possession of his own papers. We accordingly direct in modification of the order made by the learned Chief Presidency Magistrate, that the pension papers now said to be in the custody of the Court be returned to the petitioner in this application.

Henderson, J.—I agree The learned Magistrate was not correct when he thought that he had no legal power to make an order in favour of the petitioner. The terms of Sec. 517, Criminal Procedure Code, are plain enough. He, however, rightly lays down that ordinarily in a case where the accused is acquitted, any property before the Court will be returned to the person with whom it was found or who produced it. But this is not an ordinary case. The only person to whom the pension paper is of the slightest use is the petitioner. The complainant cannot make a legitimate use of it and can only

use it as a lever to extort money out of the petitioner; I am certainly not prepared to assist him to do that.

U. K. M.

(S. C.) 43 C. W. N. 250; 12 Ind. Rul. Cal 92; A. I. R, 1939 Cal. 161; 182 I. C. 649.

Civil Rule No. 419 of 1938.

PRESENT:—JACK, J.

8th November, 1938.

SUBODH CHANDRA MALLICK.

v.

AJODHYA HATUI.

Sale set aside on the application of an intending purchaser—Sec. 151 C. P. Code—Jurisdiction of the Court to set aside the sale.

An intending purchaser was misled by the mortgagee of the attached property who got permission to deposit the decretal amount and got the chalan passed and showed it to the said intending purchaser, but failed to deposit the amount and sale was held. On his application the court set aside the sale and on resale he purchased the property. The original auction purchaser moved the High Court.

Held—That if the intending purchaser is misled by some omission or wrong procedure on the part of the Court, the sale might be set aside under the provisions of Sec. 151 C. P. Code, but when the misapprehension is due to the action of a third party Sec. 151 C. P. Code has no application.

Held also—That no sale can be set aside without notice to the auction-purchaser,

Held further—That if the judgment-debtor or other parties interested applied under order XXI Rule 90 on the ground of prejudice due to the facts alleged the Court would have jurisdiction to set aside the sale.

Appeal against the order of the Munsif Court of Jhargram (Midnapur).

The facts appear from the Judgment.

Mr. S. C. Lahiri—for the Petitioner.

Mr. P. C. Mazumdar—for the Opposite Party.

Order.—This Rule was issued calling upon the opposite party to show cause why the order, complained of in the petition, passed by the learned Munsif of Jhargram cancelling

SUBODH CHANDRA MALLICK v AJODHYA HATUI.

a sale and ordering a re-sale of certain property should not be aside on the ground that the learned Munsif had no jurisdiction to set aside the sale in exercise of his inherent power under Sec. 151, C. P. Code. The circumstances are as follows : On November 20th, 1937, on the prayer of the judgment-debtor, waiving all objections, to the issue of fresh sale proclamation, the case was adjourned to December 15th, 1937, for sale. On December 15th, 1937, it was similarly adjourned to January 15th 1938, for sale. On January 15th, 1938, it was similarly adjourned to February 15th, 1938, and on February 15th, 1938, it was adjourned to February 16th, 1938. On February 16th, 1938 a petition was filed by a mortgagee askiog permission to deposit provisionally to decretal dues. On this it was ordered :

"...Put up on February 18th, 1938, with chalan. Inform decree-holder. Let the amount be deposited in Court as prayed for."

On February 18th, 1938, this order was passed : "Money not deposited. Put up for sale at once." Then the sale was held and the Nazir reported that one Subodh Chandra Mullick purchased the property at Rs 101 and deposited the earnest money. On February 19th, 1938, the learned Munsif recorded this order :

"The sale has already taken place and has been accepted. One, third person, Govinda Prosad Jana appears with a petition praying for re-sale of the property after the cancellation of the sale already held. Heard Pleaders. As the sale has not been confirmed, the Court has ample jurisdiction to set aside the sale or to refuse to confirm the sale ; *vide Raghava Chariar* v, *Murugesa Mudali* (1). On the grounds as set forth in the petition, I think the sale is liable to be set aside. The petition is therefore allowed. Let the property be re-sold on the petitioners' paying the earnest money of Rs. 24-4-0 to the A. P. Put up for re-sale on February 26th, 1938. Inform the parties through their respective Pleaders."

Thereafter the property was re-sold and purchased by Govinda Prosad Jana at Rs. 400. The petitioner contends that under the provisions of Or. XXI, r. 92 the Court was bound to make an order confirming the sale and had no jurisdiction to set aside the sale, there having been no application under Or. XXI, rr. 89, 90 and 91. This was not a case in which the Court was entitled to act under Sec. 151 and to cancel the sale.

(1) 46 M. 583 ; 72 I. C. 545 ; A. I. R. 1923 Mad. 635 ; 44 M. L. J. 680 ; (1923) M. W. N. 323 ; 32 M. L. T. 285 ; 17 L. W. 750.

SUBODH CHANDRA MALLICK v. AJODHYA HATUI.

The petition on which the sale was cancelled sets forth that the petitioner had attended the Court on the 17th and the mortgagee having shown him a deposit chalan he was under the impression that the decretal dues would be deposited and that there would be no sale on February 18, and was confirmed in this view by the fact that a lot lower in the list was sold on February 17. In support of his jurisdiction to exercise his inherent powers in this case, the learned Munsif has referred to the case in RAGHAVA CHARIAR v. MURUGESA MUDALI (1), where it was held that the Court has inherent powers to refuse to confirm and auction-sale held under its order if it is satisfied that it has been misled either in giving leave to bid to the decree-holder or in fixing the reserve price and that Or. XXI, r. 92 is no bar to the Court exercising its inherent power to refuse to confirm the sale, even though no party applied to cancel the sale. No doubt, the Court has inherent power where there is an abuse of the process of the Court, but the question is whether in the present case there has been any abuse of the process of the Court or whether the Court was misled by the conduct of the parties as in the Madras case. In that case the decree-holder who had applied for leave to bid had failed to disclose the fact that for the property Rs. 36,000 had already been bid in a previous suit and that the Court had refused in that suit to sell for anything less than Rs. 45,000. The learned Judge says that he would certainly have refused leave to bid and would not have fixed so low a reserve price as Rs. 3,000 if he had been placed in possession of the facts. The circumstances of that case are, therefore totally different from the facts of the present case. In the present case there is no suggestion that the Court was in any way misled by the conduct of any of the parties. All that can be said in favour of setting aside the sale is that third party owing to the conduct of another third party was misled and therefore did not attend the auction of the property on February 18. The case was fixed for February 18, and the parties who wanted to bid would naturally suppose that the order would be passed on the 18th whether for sale or for acceptance of the deposite which was made. If the opposite party wished to obtained the property, he ought to have been present in Court on the 18th when the order for sale was passed on the failure on the mortgagee to

(1) 46 M. 583 ; 72 I. C. 545 ; A. I. R. 1923 Mad. 635 ; 44 M. L. J. 680 ; (1923) M. W. N. 323 ; 32 M. L. T. 285 ; 17 L. W. 750.

make the deposit, Had the application for setting aside the sale been made by the judgment-debtor on the ground that there was no proper notice of the sale or that the public were misled into thinking that there would be no sale on the 18th there would have been some ground for the order setting aside the sale.

But even in his application on February 19th, the opposite party did not state that the sale was held on an unauthorized date. It is not contested that the Court had no jurisdiction to set aside the sale under the provisions of Or. XXI, r. 92 and the only contention made on behalf of the opposite party is that the Munsif is justified in passing the order under Sec. 151. The case reported in RAGHAVA CHARIAR v. MURGESA MUDALI (1), is an authority for holding that in a proper case such an order could be passed by virtue of the Court's inherent power. With reference to this case, it has been observed by Madhavan Nair, J. in SORIMTHU PILLAI v. MUTHUKRISHNA PILLAI (2).

"In *Raghava Chariar* v. *Murgesa Mudali* (1) it was held that the Court has inherent power to refuse to confirm the sale on the ground that it was misled in fixing the reserve price. This may also be treated as a case, having regard to the fact that the Court was misled into passing an order for sale, where there had been no valid sale."

Thus, the case on which the Munsif founds his jurisdiction is clearly distinguishable from the present case. In SHANKAR v. JAWHARLAL, (3). Kinkhede, A. J C. lays down :

"With due respect I venture to think that, just as in the face of an express provision of the Statute law, there is no scope for the exercise of its inherent jurisdiction under Sec. 151, C. P. Code, by a Court, similarly there ought to be little or no scope for the parties to exercise their inherent right to settle their disputes if its effect is to violate the express provisions of a statute which creates or recognizes the claims or rights of *bona fide* purchasers not parties to the decree."

In view of the express provisions of Or. XXI, r. 92, in my opinion there is no justification for setting aside the sale contrary to the provisions of the rules. If the parties concerned wish to set aside the sale, let them do so under the

(1) 46 M. 583 ; 72 I. C. 545 ; A. I. R. 1923 Mad. 635 ; 44 M. L. J. 680 ; (1923) M. W. N. 323 ; 32 M. L. T. 285 ; 17 L. W. 750.
(2) 56 M. 808 ; 143 I. C. 854 ; A. I. R. 1933 Mad. 598 ; 65 M. L. J. 253 ; Ind. Rul. (1933) Mad. 339 ; 38 L. W. 118 ; (1933) M. W. N. 1081.
(3) 121 I. C. 895 ; A. I. R. 1928 Nag. 265 ; 24 N. L. R. 127 (F. B.).

provisions of the law, but in this case a third party wishes to set aside the sale on the ground that owing to a misapprehension he failed to be present on the day of the sale and therefore was unable to bid. Had that been due to some omission or wrong procedure on the part of the Court, the sale might have been set aside under the provisions of Sec. 151, but because of the action of a third party the opposite party was misled and was not present at the sale, on such a ground there is certainly no jurisdiction to set aside the sale under Sec 151. In support of this view I have been referred to the cases in NANHELAL v. UMRAO SINGH (1) and GANDA MAL v. TAJ DIN (2). It has also been urged on behalf of the petitioner that no notice was given to the auction-purchaser of the order setting aside the sale. No doubt the learned Munsif heard the pleaders on both sides, but there is no indication that the purchaser himself was present or represented when the order was made. On this ground also, the order was not justified. This Rule is accordingly made absolute and the order cancelling the sale is set aside. In the circumstances of the case, I make no order as to costs.

U. K. M.

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(1) A. I. R. 1931 P. C. 33 ; 130 I. C. 686 ; 58 I. A. 50 ; 27 N. L. R. 95 ; 14 N. L. J 28 ; 53 C. L. J. 187 ; 35 C. W. N. 381 ; 60 M. L. J. 423 ; 33 L. W. 449 ; (1931) A. L. J. 257 ; (1931) M. W. N. 281 ; 8 O. W. N. 585 ; Ind. Rul. (1931) P. C. 54.

(2) 13 L. 761 ; 142 I. C. 686 ; A. I. R. 1933 Lah. 99 ; 34 P. L. R. 70 ; Ind. Rul. (1933) Lah. 25.

(s.c.) 43 C. W. N. 191 ; 12 Ind. Rul. Cal. 84 ; A. I. R. 1931 Cal. 181 ; 182 I. C. 615.

Civil Rule No. 609 of 1938.

Present :—B. K. MUKHERJEA, J.

10th November, 1938.

SURENDRA NATH BOSE

v.

ASHUTOSH SAHA. and others.

Material alteration what it is—If invalidates a deed Actionable claim—Equities against assignee.

SURENDRA NATH BOSE v. ASHUTOSH SAHA.

Certain properties were conveyed to the Deft. a part of consideration was held back as a third party who lost in two Courts may file a second appeal. It was stipulated that it would be paid if no appeal be filed or if filed when appeal is dismissed, but if the Deft. bears the costs of the appeal they would be entitled to deduct the costs incurred. At the end of the Kobala it was stated that time for filing the appeal has expired and if the balance be not paid within 7 days *kobala* will be void. This last clause was an interpolation. The appeal was actually filed and contested at the Deft's costs and dismissed. The vendor then transferred his right to the balance on consideration to the plaintiff,

Held—That though a material alteration nullify a document, here there was no material alteration, hence the plaintiff is entitled to a decree for the balance of the purchase money after the set off for the costs incurred by the debt in the appeal.

Held—That the plaintiff purchased actionable claim subject to the equities that can be urged against the assignor.

Appeal against the order of the Sub-Judge of Pabna.

The facts appear from the Judgment.

Mr. *N. C. Chakravarty*—for the Petitioner.

Dr. *Radhabinod Pal* and *Mr. R. N. Chowdhury*—for the Opposite party.

Order.—This is a Rule obtained by the plaintiff-petitioner on an application under Sec. 25, Provincial Small Cause Courts Act, and it is directed against a decree of dismissal passed by the First Subordinate Judge, Pabna, in Small Cause Court Suit No. 35 of 1937. The material facts may be shortly stated as follows: Two brothers named Kristo Das and Debi Das purported to own a house in the town of Pabna and they mortgaged the said house to one Asutosh Saha, the predecessor of the opposite party in the present rule on August 23rd 1929, to secure an advance of Rs. 2,000 only. After this mortgage, Kristo Das sold his equity of redemption to his wife Arunprova. The mortgagors had a step-brother named Girish who claimed a third share in the mortgaged property and he started a suit for partition of his share in the mortgaged premises on that footing. This suit was dismissed by the trial Court as well as by the Appellate Court and Kristo Das and Debi Das were declared to be the 16 annas owners of the house in dispute.

At about this time, there were negotiations between the mortgagee and the mortgagors for sale of the mortgaged property to the former, the debtors having no other means of

paying off the debt. On June 19th, 1933, a KOBALA was executed by the two brothers, Kristo Das and Debi Das as well as by Kumudini (their mother) and Arunprova, the wife of Kristo Das by which the mortgaged properties were sold to Asutosh for a consideration of Rs. 3,700 only. The KOBALA recited that the mortgage debt amounted to Rs. 2,650 and deducting that from Rs. 3,700 which was settled as the price of the property, a sum of Rs. 1,050 was payable by the vendee to the vendors. As however Girish was threatening at that time to file a second appeal to this Court and the result of the litigation was still unknown, the vendee paid only half of the balance of the consideration money amounting to Rs. 525 and retained the other half as deposit in his hands. It was stipulated in the KOBALA that if no appeal was filed by Girish, then on the expiry of the period of limitation fixed for the filing of such appeals and even if an appeal was filed, then on that appeal being dismissed, the balance of Rs. 525 would be paid by Asutosh to Arunprova. The vendors on the other hand agreed to carry on the litigation with Girish and pay all his expenses, and in case he did not, the purchaser was given the option of carrying on the litigation himself and he was to be reimbursed for all the expenses which he would have to incur for this purpose. At the end of the document and after it was apparently finished, appeared a clause which read as follows :

" Be it declared that the date of filing the appeal has expired on June 17, 1937, and if within seven days from this date the balance of purchase money is not paid, the document would be void and inoperative."

As a matter of fact, however, an appeal was duly filed by Girish and it was eventually heard and disposed of by this Court on March 19, 1936. On February 22, 1937, the present plaintiff got two conveyances, one from Arunprova and the other from the three other vendors by which the claim of the vendors to the unclaimed purchase money was transferred to him. It is on the strength of this KOBALA that the plaintiff has instituted the present suit and he has claimed a sum of Rs. 700 representing the balance of purchase money and interest thereon under the terms of the KOBALA. The trial Court dismissed the suit on the sole ground that there was a material alteration in the KOBALA made at the instance of the plaintiff or his predecessors and this incapacitated him from founding a claim upon this document. It is the propriety of this view

that has been challenged before me by the learned Advocate who appears in support of this rule. It seems to me that the law on the point is perfectly well-settled. As was laid down in MASTER v. MILLER (1):

"Whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument."

The principle has been applied by the Court, in several cases :VIDE the cases in GOUR CHANDRA DAS v. PRASANNA KUMAR CHANDRA (2) and HARAN CHANDRA v. KISHORI LAL (3). The whole controversy therefore narrows down to this as to whether there was any material alteration in the document made by or at the instance of the plaintiff or his predecessor which makes him incapable of enforcing any obligation, covenant or promise contained in the same. The Judge has held that the document was materially altered by interpolation of the clause at the end of the document which I have set out above and which is to the effect that as the date of filing the appeal by Girish had expired the balance of the purchase money would have to be paid within seven days, failing which the document would be void and infructuous. Assuming that it was an interpolation, the question arises as to whether the rights and liabilities or the legal position of the parties as ascertained by the original deed were altered in a material way by the insertion of this clause. In my opinion the answer to the question must be given in the negative. The document clearly shows that it was the intention of the parties that the balance of the purchase money would be paid only if no appeal was filed by Girish or if any appeal was filed by him, when the said appeal was dismissed. As was held by the Court below, the clause mentioned above was based upon a total misapprehension. It was assumed wrongly that the time for filing the appeal had already expired and consequently the balance of the purchase money had become payable under the terms of the document itself. It merely laid down a time limit, namely seven days within which the money was to be paid though there was no such stipulation in the unchallenged part of the document.

(1) 100 E. R. 1042 ; 2 R. R. 399 ; (1791) 4 T. R. 320.
(2) 10 C. W. N. 783 ; 3 C. L. J. 363 ; 33 C. 812.
(3) A. I. R. 1929 Cal. 789 ; 50 C. L. J. 173.

The original stipulation would seem to indicate that the money became payable as soon as the time for filing the appeal expired. The so-called alteration mentioned a period of time within which it had to be paid. It was held, however, and that rightly, by the Court in the previous litigation between the parties that the time was not of the essence of the agreement with regard to either of the stipulations. If that is so, I am unable to hold that the alteration made any material change as regards the rights of the parties or that their legal position was in any way altered. In my opinion, therefore, the plaintiff's case should not have been dismissed on this ground alone.

There is one matter, however, which requires consideration before the plaintiff can be given any relief. It appears that it was the opposite party who carried on the litigation with Girish and eventually brought it to a successful termination. According to the terms of the KOBALA they were entitled to have the expenses incurred by them in connection with that litigation, and they also get a decree for costs against the plaintiff's predecessors. As an assignee of an actionable claim, the plaintiff could get the rights subject to all equities that could be urged against the assignor. The Court, however, rejected this part of the defendants' case on the ground that the defendants did not pay proper court-fee and the claim was beyond the pecuniary jurisdiction of the Small Cause Court. I do not think that either of these difficulties was insuperable. If it was beyond the Small Cause Court jurisdiction of the Subordinate Judge, he could try the case as an ordinary money suit, and in any event, if the demend for set-off was well-founded, it could have been allowed to the extent of the plaintiff's claim. The defendants might also have been called upon to pay proper court-fees upon the claim they made. In my opinion this part of the defendants' case requires investigation. I therefore make the Rule absolute and set aside the judgment and decree of the lower Appellate Court. The case is sent back to the Subordinate Judge in order that the defendants' claim for set-off as made in their written statement may be considered and decided. If the Court thinks it necessary, it might allow the parties to adduce additional evidence on the point. The Rule is accordingly made absolute. There will be no order as to costs in this Rule.

U.K.M.

(1 C) 43 C. W. N. 187 ; (1939) 42 Ind. Rul. Cal. 60 ; 68 C. L. J. 513 ; A. I. R. 1939 Cal. 177 ; 182 I. C. 408.

Civil Rule No. 93 of 1938.

Present :—B. K. MUKHERJEA, J.

11th November, 1938.

KAILASH CHANDRA BHAUMIC

v.

RAM KANAI CHAKRAVARTY and others.

Bengal Agricultural Debtors' Act VII of 1936—Notice under Sec. 34, when to be given—Sec 8. if a puisne mortgagee without personal liability is a debtor—Jurisdiction of Civil Court executing a decree to determine the propriety on notice under Sec 34.

The petitioner was a puisne mortgagee and was impleaded in a mortgage suit and a mortgage decree was passed against him as well though he had no personal liability. During execution he applied under Sec. 8 of Bengal Agricultural Debtors' Act in respect of this debt and notice under Sec. 34 was issued upon the executing Court which refused stay—on motion to High Court,

Held —That when a suit or proceeding is pending before a Civil or Revenue Court in respect of a debt included in a petition under Sec, 8 B, A. D. Act, Board has jurisdiction to issue a notice for stay under Sec. 34. *Jagabandhu v. Rashmoni* I. L. R. (1937) 2 Cal. 625.

Held also —That when the debt has been satisfied by sale of the property, there being nothing to stay no notice under Sec 34 can issue.

Held further—That on receiving notice under Sec. 34 Civil Court cannot investigate the question whether the applicant is a debtor.

Held too—That the petitioner could be a debtor though there is no personal liability to pay.

Appeal against the order of the District Judge of Noakhali.

The facts appear from the Judgment.

Messrs. *J. K. Sen Gupta* and *M. K. Ghose*—for the Petitioner.

Messrs. *C. S. Sen* and *Bhabtosh Chakravarty*—for the Opposite Party.

Order.—The petitioner is one of the judgment-debtors in a proceeding for execution of a mortgage decree and the rule is directed against an order of the Munsif, Third Court, Sudharam, dated November 15th, 1937, refusing to stay the execution proceedings after receipt of a notice from the Debt Settlement Board under Sec. 34, Bengal Agricultural Debtors' Act. The facts necessary for the purpose of this rule may be shortly stated as follows : The opposite party No. 1 is the mortgagee decree-holder who obtained a mortgage-decree on April 9th,

KAILASH CHANDRA BHAUMIC v. RAM KANAI CHAKRAVARTI

1931. The original mortgagor is opposite party No. 2 and the petitioner is the purchaser of one of the mortgaged properties at an execution sale and he has acquired the other property by inheritance and partition after the death of his father who purchased the same at a private sale. He was impleaded as a defendant in a mortgage suit and the usual mortgage decree was passed. The mortgaged properties were put up to sale and purchased by the decree-holder on July 27th 1933. The sale was subsequently set aside and the present application for execution was made in 1937. After the execution proceedings were started, the petitioner made an application to the Debt Settlement Board under Sec. 8, Bengal Agricultural Debtors' Act, and the Board issued a notice to the Court under Sec. 34 of the Act. The Munsif before whom the execution case is proceeding, at first, granted a stay but later on vacated the order on the ground that the petitioner was not a debtor and consequently was not competent to present any application for settlement of his debts under Sec. 8, Bengal Agricultural Debtors' Act. Against this order, there was an appeal taken to the Court of the District Judge of Noakhali and the learned District Judge dismissed the appeal and upheld the decision of the trial Court. It is conceded before me that the appeal was misconceived and incompetent in law and I have been invited by this rule to revise the original order of the Munsif refusing to stay the execution proceedings.

As I have said above, the Munsif has refused to stay the proceedings on the ground that the petitioner was not a debtor, and as such, was not competent to come under the Agricultural Debtors Act. It is quite true that the condition precedent for giving the Board jurisdiction to issue a notice under Sec. 34, Bengal Agricultural Debtors' Act, is the inclusion in the petition under Sec. 8 of a debt in respect of which a suit or proceeding is pending before a Civil or Revenue Court : VIDE the case in JAYABANDHU SAHA v. RASHMANI DASYA (1). If the proceeding had already come to an end by reason of the fact that the debt was discharged or satisfied by sale of the judgment-debtors' property, then there would be nothing to stay and the Civil Court could not be called upon to exercise jurisdiction under Sec. 34 : see the cases in JAGABANDHU ROY v. BHUSAI BEPARI

(1) I. L. R. (1937) 2 Cal. 625 ; 41 C. W. N. 524.
(2) 11 R. C 343 ; A. I. R. (1938) Cal 256 ; 178 Ind. Cas. 344 ; 42 C. W. N. 217.

and RAMENDRA NATH MONDAL v. DHANANJOY MONDAL (1). In the present case, however, there is no dispute that there is a proceeding in execution pending before the Civil Court in respect of a debt and the decree of the Civil Court in the mortgage suit is conclusive evidence as regards the existence of the debt. The contention of Mr. Sen who appears on behalf of the opposite party is that there might have been a debt and a proceeding in respect of the same but the present petitioner was not a debtor and he could not in law invoke the jurisdiction of the Bengal Agricultural Debtors' Act in his favour. What is said is this that he did not borrow any money and was under no personal liability to the mortgagee-decree-holder. He was the purchaser of certain properties which were undoubtedly subject to the mortgage debt but the equity of redemption which he purchased was in law a right and not a liability. This contention in my opinion cannot succeed. It is not open to a Civil Court on receiving a notice under Sec. 34, Bengal Agricultural Debtors' Act, to investigate the question as to whether the applicant before the Board was a debtor or not : see the cases in NURSINGDAS TUNSUKDAS v. CHOGEMULL (2), HARISH CHANDRA PAL v. CHANDRA NATH SAHA (3) and SOILABALA v. NITYANANDA (4). This has to be decided by the Board under Sec. 20 of the Act and the decision can be revised by the appellate officer appointed under Sec. 40 of the Act.

But even assuming that the Civil Court is at liberty to enter into this question, I cannot accept the contention of Mr. Sen that a purchaser of the equity of redemption who was made a party to the mortgage suit and against whom the usual mortgage decree was passed was not a debtor within the meaning of law. A debt as defined in the Bengal Agricultural Debtors' Act includes all liabilities of the debtor in cash or kind, secured or unsecured whether payable under a decree or order by a Civil Court or otherwise and whether payable presently or in future. There is a decree in the present case against the petitioner who is liable to pay the mortgaged property is to be sold. The fact that he cannot be made personally liable does not really affect the question. I would therefore make the Rule

(1) 11 R. C. 329 ; A. I. R. (1938) Cal. 261 ; 178 Ind. Cas. 186 ; 42 C. W. N. 218.

(2) 11 R. C. 364 ; A. I. R. (1938) Cal. 402 ; 178 Ind. Cas 589 ; 42 C. W. N. 293

(3) 11 R. C. 846 ; I. L. R. (1938) 2 Cal. 155 ; A. I. R. (1938) Cal. 369 ; 181 Ind. Cas. 739 ; 42 C. W. N. 411.

(4) I. L. R. (1938) 2 Cal. 168 ; A. I. R. (1938) Cal. 375 ; 42 C. W. N. 415.

KAILASH CHANDRA BHAUMIC v. RAM KANAI CHAKRAVARTI.

absolute and set aside the order of the learned Munsif. The execution proceedings are directed to be stayed Having regard to the conduct of the judgment-debtor which is not at all honest, I make no order for costs in this Rule.

U. K. M.

(S.C) (1939) 18 Ind. Rul Cal. 153 ; 183 I. C. 349 ; 43 C. W. N. 950 ; A. I. R. 1939 Cal. 529 ; 69 C. L. J. 599.

SPECIAL BENCH.

Criminal References Nos. 2 and 3 of 1939.

Present :—DERBYSHIRE C. J., NASIM ALI AND RAU, JJ.

7th June 1939.

EMPEROR

v.

HEMENDRA PROSAD GHOSH and another.

Cr. P. Code (Act V of 1898) Sec. 432—Power of reference—I. P. Code Act. (XLV of 1860) Sec. 124-A and Sec 17—The "Government"—Within the meaning of—Subordinate to the Governor—Government of India Act Sec. 49—Ministers whether the Government.

Held—That the ministers chosen from the elected representatives of the people of the Province for the purpose of carrying into effect, if possible, and within prescribed limits, their wishes, and acting as advisers to the Governor, can not be described as "Officers subordinate" to the Governor within the meaning of Sec. 49, Government of India Act 1935.

The facts appear from the Judgment.

Sir *A. K. Roy* (Advocate-General) and Mr. *A. C. Roy Chowdhury*—for the Crown.

Messrs. *N. K. Basu*, *S. N. Mukherjee*, *S. C. Talukdar*, *Sukumar Dey*, *S. K Basu*, *Pashpati Bhattacharjee* and *P. N. Mukherjee*—for the Accused.

Opinion—The two articles out of which these two references arises are alleged to be attacks upon the Council of Ministers in Bengal and it is complained that they are seditious and in breach of Sec. 124-A, I. P. Code, which provides :

"Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

Sec. 17 I. P. Code, provides :

"The word 'Government' denotes the person or persons authorized by law to administer executive government in any part of British India."

The questions asked are: Under case No. 2 of 1939 (a) whether the Hon'ble Ministers of Bengal are subordinate officers to H E. the Governor within the meaning of Sec. 49, Government of India Act, 1935? (b) whether the Council of Ministers should be considered as "Government established by law."

Under case No. 3 of 1939 (a) whether the ministry of a Province can be said to form a part of the executive Government of that Province in the sense implied by Sec. 17, I P. Code?

The reference is under the first part of Sec. 432, Cr. P. Code, and asks us specific questions but does not enable us to deal completely and finally with the matter. The Government of India Act, 1935, defines the rights and duties of ministers and their relation to the Government of a Province.

Sec. 49 (1) of the Act provides that:

"'the executive authority' (which is the same thing in our opinion as legal authority to administer executive Government of a Province) 'shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him.'"

Sec. 59 (1) provides:

"All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor."

Sec. 50 (1), provides:

"There shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by, or under this Act, required to exercise his functions or any of them in his discretion."

Sec. 51 (1) provides:

"The Governor's Ministers shall be chosen and summoned by him, shall be sworn as members of the Council, and shall hold office during his pleasure."

Sub-sec. (4) of Sec. 51 provides:

"The question whether any, and if so, what, advice was tendered by ministers to the Governor shall not be inquired into in any Court."

Sub-sec. (5) of Sec. 51, provides:

"The functions of the Governor under this section with respect to the choosing and summoning and the dismissal of ministers, and with respect to the determination of their salaries, shall be exercised by him in his discretion."

Sec. 53 provides that the Instrument of Instructions which it is proposed that His Majesty shall issue to the Governor shall be laid before Parliament previous to issue. In para. 8 of the Instrument of Instructions issued to the Governor of Bengal it is stated :

"In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by or under the Act to exercise in his discretion, our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless..."

Sec. 59 (3) provides :

"The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion."

There is no specific provision in the Government of India Act nor in any other Statute or Act which we are aware of vesting the ministry with executive functions. On the other hand such functions "shall," in the words of Sec. 49 of the Act, "be exercised by the Governor either directly or through officers subordinate to him." The use of the word "aid" in Sec 50 does not, in our view, vest the ministers with any right to exercise executive authority, since such a construction would be contrary to the clear provision in Sec. 49, nor, can the rules for the transaction of the business of the Government of Bengal made under Sec. 59 (3) of the Act override or alter, in law, the same clear provisions. Again, the Instrument of Instructions, which cannot be and does not purport to be, in contradiction of the Act, clearly contemplates the Governor exercising the powers conferred upon him (save where in certain instances specified he acts alone) "guided by the advice of his ministers." The Instrument of Instructions contemplates the Governor, and not the ministers, exercising executive authority. The position appears to be that, unless the ministry can be held to consist of officers subordinate to the Governor within the meaning of Sec. 49 (1) of the Act, it cannot exercise execute functions. In our view, ministers chosen from the elected representatives of the people of the Province for the purpose of carrying into effect, if possible, and within prescribed limits, their wishes, and acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor within the meaning of Sec. 49, Government of India Act, 1935. It follows therefore that although in popular language, the ministers may be

referred to as "the Government" they are not "the Government" within the meaning of Secs. 17 and 124-A, I. P. Code. Whatever may happen in practice, the ministers are, in law, the Governor's advisers. For these reasons we are of the opinion that the answers to all the three questions put to us is "No."

Although the Presidency Magistrates have, under Sec. 432, Cr. P. Code, the power to refer for the opinion of the High Court any question of law which arises at the hearing of any case pending before them, it may be undesirable—and in our view in this case it was undesirable—to make the reference in the form it came before us. It has involved giving a decision on law, divorced to some extent from the facts. It may be that when the learned Magistrates have dealt with these charges according to law, the same matters may come before this Court on appeal. The more desirable course is for the Magistrate to use the second part of Sec. 432, Cr. P. Code, which provides that he may give judgment in any such case subject to the decision of the High Court on such reference. By adopting this course, duplicity of hearing in both Courts would probably be avoided and all the facts would be before this Court once for all. Sec. 205 (1), Government of India Act, 1935, provides:

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly."

In our opinion this case involves a substantial question of law as to the interpretation of the Government of India Act, 1935. But at the same time we are of the opinion that the decision we have given is an opinion and not a judgment or decree or final order of the Court. It may be that hereafter the same matter will come before us again after it has been dealt with by the Presidency Magistrates. Accordingly, we give no certificate.

M.

(8 C) (1939) 18 Ind. Rul. Cal. 159 ; A. I. R. (1939) Cal. 539 ;
69 C. L. J. 344 ; 183 I. C. 433.

Criminal Appeal No 587 of 1938.

Present :—HENDERSON AND KHUNDKAR, JJ.

20th December, 1938.

Syed ABDUL JALIL and others

v.

EMPEROR.

I. P. Code (Act XLV of 1860) Sec. 302—Conspiracy—Murder case—Evidence—Insufficient to support.

Held—That the conviction of conspiracy is based upon absolutely nothing and cannot possibly be supported.

The accused was aware of the place where the corpse was concealed and this is quite insufficient to support a murder charge.

The facts appear from the Judgment.

Messrs *S. C. Talukdar* and *B. L. Ghose*—for the Appellants.

Mr. *D N. Bhattacharjee*—for the Crown.

Henderson J.—The appellants have all been convicted of an offence punishable under Sec. 302 read with Sec. 120-B, Penal Code, for conspiring to murder one Saharulla Bepari. In the Sessions Court a further charge was added to the effect that they also conspired to commit an offence punishable under Sec. 201 of the Code. This of course is quite meaningless. If the body was in fact concealed, this was done in order to cover up the tracks of the successful conspirators. However, the learned Deputy Legal Remembrancer did not attempt to support this second conspiracy finding and it is not necessary for us to say anything more about it. It appears that Saharulla was a litigious and unpopular money-lender with several enemies. On January 8th last, he went to Kurigram where he had a case in one of the Civil Courts. He asked the appellant Tangura to meet him at the station in the evening and to escort him home. He returned by the evening train accompanied by a doctor Gafur Ali Sarkar and he left the station in company with prosecution witness No. 1, Pachaulla and the appellant Tangura. He has not been seen since. We accept the evidence of identification of the corpse which was eventually discovered and there is no doubt that he was murdered. The question for our determination now is whether it has been proved that the appellants conspired to murder him.

The case, as committed by the learned Magistrate to the Court of Session, was extremely weak. In my opinion, it

could not be put higher than one of vague suspicion and it was not really worth committing at all. The reason for this is that the prosecution had met with a serious disappointment. They hoped to get the evidence of Pachaulla who was one of the accused. But when it was tendered a pardon, he refused to accept it. When the case came on for trial in the Court of Session, an extraordinary thing happened. When Pachaulla was asked to plead, he stated that he was not guilty but that he would be glad to tell the truth. He was then tendered a pardon by the learned Judge and was examined by the prosecution as their first witness. It is mainly upon the evidence of this man that the present convictions are based.

Put shortly his evidence is to the following effect: He was able to state that Saharulla was dead, because according to him, he was an actual eye-witness of the murder. He states that he and Tangura met the deceased at Tista Station and then accompanied him home. They followed the railway line for some time and then took a path leading across some low lying land. Before they reached home, the other appellants and some other men, who were lying in wait in a bamboo clump, came out and murdered the deceased. He was able to recognize them by their voices. The appellant Dhara Baiyo gave the deceased a cigarette and struck a much in order to light it. Then when the deceased put down his head in order to light the cigarette, a man called Bhulla struck him twice with a big knife on the neck. The witness then fled in terror; but he managed to see the dead body being dragged away. Just before dawn all the appellants came to his house and told him that he was not to say anything about what he had seen.

The learned Judge before asking the assessors to give their opinion charged them at very considerable length and he put before them several questions which they must answer. Among those questions was this: Whether the story of the accused Pachaulla stands corroborated in material particulars. He never asked them to consider whether it was true or whether it established a conspiracy as alleged by the prosecution. Actually there was not a single word of a conspiracy or anything about it from start to finish. As the man's own evidence is to the effect that he was innocent entirely, he was obviously not in a position to throw any light on a conspiracy of which he was not a member and about which he knew nothing. If his evidence is accepted as the truth and the whole truth, he and

the appellant Tangura were eye-witnesses, while the other appellants should have been tried by a jury on a charge of of murder. The present conviction of conspiracy is based upon absolutely nothing and cannot possibly be supported.

It only remains to consider whether we should order a re-trial. The prosecution suggests that the appellant Tangura was a decoy. There is nothing in the evidence of Pachaulla to suggest this. It is admitted that he met the deceased at the station at the request of the deceased himself and there is nothing to suggest that he had anything to do with the route chosen or that he led an unsuspecting man into a prepared ambush. The only thing proved against this appellant, if we accept the evidence of the Police Officer, is that he was aware of the place where the corpse was concealed. This is quite insufficient to support a charge of murder

The charge against the other appellants would depend upon the credibility of the witness Pachaulla. Neither side has supported him as a witness of truth. According to the defence he has implicated the appellants falsely in order to save his own skin. According to the prosecution he himself had something to do with the murder and he suppressed all knowledge of it in his deposition. His own conduct in connection with the case does not suggest that he is a reliable sort of a man. In the Committing Magistrate's Court the prosecution expected that he would give evidence in their favour and he was offered a pardon. He refused to accept it and then in the Court of Session he volunteered to give evidence without any offer being made to him. The deposition which he actually gave appears to be marked with an entire want of frankness and he has put forward a most unconvincing story; for example, we cannot imagine why the murderes should come to him and give him an entirely gratuitous information of the place where they had concealed the corpse. In our opinion, it would not be right that the appellants should be re-tried on evidence of this sort The appeal is accordingly allowed; the convictions and the sentences passed on the appellants are set aside and they will be set at liberty immediately.

Khundkar, J.—I agree.

M.

(S C) 10 Ind Rul Cal 219 ; 43 C. W. N. 1030 ; A. I. R. (1 39) Cal. 667 ; 184 I. C. 423.

Appeal No. 5 of 1939.

Present :—HENDERSON and KHUNDKAR, JJ.

4th July, 1939.

SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS BENGAL,

v.

KSHITISH CHANDRA BANERJEE.

Cr. P. Code (Act V of 1898) Sec. 417—Appeal—The Bengal Food Adulteration Act (Act VI of 1919) Sec 6 read with Sec. 21—Offence.—Interpretation—Sec. 4 and Sec 20—Adulterated mustard oil—Analised—Not genuine—Conviction—Presumption.

Under Sec. 4 there is a presumption that the article is not genuine. Under Sec. 6 genuine musterd oil must be derived from musterd seeds. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds.

Under Sec. 14 (2) of the Act the certificate of the analyst is made evidence without formal proof, but there is no presumption that it is accurate.

The Chemical Assistant in the Test House who made the analysis is thoroughly competent and formed the opinion that the mustard oil was genuine.

Held—That the presumption has been rebutted.

The facts appear from the Judgment.

Messrs. *S. M. Bose*, *S. K. Basu* and *A. K. Basu*—for the Crown.

Mr. *Probodh Chandra Chatterjee*—for the Respondent.

Henderson, J.—This is an appeal by the Local Government under Sec. 417, Cr. P. Code, against an order of acquittal passed by the learned Sessions Judge of Jalpaiguri. The accused was convicted by a Magistrate of an offence punishable under Sec. 6 read with Sec 21, Bengal Food Adulteration Act. The appellant has a shop in a BAZAR named Barnes in the District of Jalpaiguri. On July 21, 1938, the Assistant Health Officer purchased 12 ounces of mustard oil for the purpose of chemical analysis. In accordance with the procedure laid down under the rules, the oil was placed in three bottles which were sealed, one of the bottles being made over to the accused. One bottle was sent to the analyst employed by the District Board. The accused's bottle was sent at his request to the Government Test House at Alipur to be analized. As a result of the analysis made by the analyst of the District Board, which showed that the oil was adulterated, the accused was put on his trial and

convicted. The point of law urged on behalf of the Crown in the appeal is concerned with the interpretation of Sec. 4 and Sec. 20 of the Act. Sec. 4 lays down that in certain circumstances a presumption is to be drawn that the article in question is not genuine. There can be no doubt that if the certificate given by the District Board analyst is accepted, in view of the rules framed by the Local Government under Sec. 20 (2) (a), the mustard oil was not genuine. It is plain from his judgment that the learned Sessions Judge appreciated this. But according to the submission of the Crown he has stultified this provision of the law by the way in which he dealt with the question whether the presumption had been rebutted.

The learned Advocate-General put forward two points. His first contention was that the presumption could only be rebutted by following the oil from the mustard seeds throughout the process of manufacture right up to its arrival in the shop of the accused and demonstrating that no deleterious substance had been introduced. In the second place he argued as an alternative that the only other way in which the presumption could be rebutted is by the accused proving that there was no adulterant, common or rate, of any sort in the oil. In support of the first proposition, he relied on a series of English cases which were concerned with the interpretation of Sec. 6, Sale of Food and Drugs Act of 1875. Under the provisions of that section, no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance and quality of the article demanded by the purchaser under a penalty. Sec. 4 makes provision for the raising of a presumption in circumstances similar to those in the Bengal Act.

The first of these decisions is that in HUNT v. RICHARDSON (1) which was heard by a Court of five Judges in the Kings Bench Division. They differed by 3 to 2. They were largely concerned with the meaning to be attached to the provisions of Sec 6 which have no application to the Bengal Act. The only decision which goes so far as the contention of the learned Advocate-General is that in JENKINS v. WILLIAMS (2) decided last April in which the accused was not represented. In my opinion the weight of the decisions is not in favour of this contention.

(1) 60 S. J 588 ; 25 Cox. C. C. 441 32 T. L. R. 560 ; 14 L. G. R. 854 ; 80 J P 385 ; 8 L. J K B. 1360 ; (1916) 2 K. B. 446.
(2) (1939) 160 L. T. 507.

Then again all these cases were concerned with milk which is quite a different commodity from mustard oil. It is produced by an animal and sold within a few hours of its production. There can be no difficulty in tracing its history in any particular consignment from the animal to the distributor. If such a rule were to be applied to mustard oil, the burden cast upon the accused would be one which it would be quite impossible for him to discharge.

The question really depends upon the terms of Sec. 4 and Sec 6. The presumption raise under Sec. 4 is that the article is not genuine. Sec. 6 lays down that mustard oil must be derived exclusively from mustard seeds. We cannot find any warrant for the proposition that the accused person can be tied down to any particular method for establishing his defence. On the second point the judgment of the learned Judge was criticized with regard to this passage:

"The only conclusion I can come to on the evidence and the two reports before me is that the report submitted by the defence comes nearer to showing that the oil is pure mustard oil than the report of the prosecution to showihg that it is adulterated. In my opinion when the common adulterants are proved to be absent, the prosecution should show what the actual adulterant is because the presumption arising under the rules is for all practical purpose rebutted."

The contention of the learned Advocate-General was that this is to render the provisions of Sec. 4 nugatory. He contended that the true position is exactly the opposite and that the presumption is not rebutted unless the accused himself proves that no adulterant of any sort is present. In our judgment neither of these views is correct. If the learned Judge meant that when the accused shows that none of the common adulterants was present, the Court must hold that the presumption has been rebutted, then in our opinion he went too far. In the present case unless he was prepared to hold himself on the evidence that the presumption was fully rebutted, he should uphold the conviction. On the other hand the contention of the learned Advocate-General goes too far in the other direction as it ignores the precise point which the accused has to prove. I will repeat the relevant provisions of that Act. Under Sec. 4 there is a presumption that the article is not genuine. Under Sec. 6 genuine mustard oil must be derived from mustard seeds. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds.

LEGAL REMEMBRANCER, BENGAL v. KSHITISH CHANDRA.

Turning to the facts of the present case, the first point for determination is whether the presumption is to be raised at all. Under Sec. 14 (2) of the Act the certificate of the analyst is made evidence without formal proof, but there is no presumption that it is accurate. In the present case we have conflicting reports by two experts whose integrity has not been and cannot be called in question. It is thus abundantly plain that errors are possible and a slight variation from the standard might justify the Court in refusing to raise a presumption at all. In the present case the District Board analyst found nothing wrong with the iodine value. Both the analysts found that the saponification value was excessive. In these circumstances we are of opinion that the presumption should be raised. It remains to be considered whether it has been rebutted. It has been proved that none of the common adulterants was present. This has obviously taken the accused a very long way towards his goal. The Chemical Assistant in the Government Test House who made the analysis is thoroughly competent. He formed the opinion that the mustard oil was genuine. He further explained that different mustard seeds give different saponification value owing to the peculiar properties of the seeds. This is quite enough to account for what was found in the present case. We accept that opinion and in view of that opinion, it must be held that the presumption has been rebutted. The appeal is dismissed.

Khundkar, J.—I agree.

M.

(s. c.) 43 C. W. N. 221 ; A. I. R (1938) Cal. 549 ; 12 Ind. Rul (Cal.) 91.

Civil Revision Case No. 1 69 of 1938.

Present :—S K. Ghose and Edgley, JJ.

6th May, 1938.

JATINDRA MOHAN BANIK

v.

SURENDRA MOHAN ROY CHOUDHURY.

Bengal Agricultural Debtors' (Act VII of 1936)—Sale held in execution—Sale proceeds to be distributed amongst creditors—Proceedings for rateable distribution pending—Notice under Sec. 34 for stay of proceedings if lies.

After the sale took place in execution but before the sale proceeds were distributed rateably amongst several creditor, the judgment-debtors applied under Sec. 8, of Bengal Agricultural Debtors' Act and a notice under Sec. 34 was served upon the executing Court but it refused to stay. On motion to High Court,

Held—That once a sale has taken place the debt has ceased to exist to the extent of the purchase price and therefore there is no proceeding pending with regard to the amount of debt in the Civil Court.

Held that—The the various kinds of proceedings taking place between sale and its confirmation will not keep the proceedings pending with regard to the debt.

Held also—That applications for rateable distribution, for setting aside a sale and so on are extraneous matters and are not proceedings with regard to the mentioned in the notice under Sec. 34.

Held further—That as after sale no proceedings remain with regard to the debt, no notice under Sec. 34 lies.

Appeal against the order of the Sub-Judge of Mymensingh.

The facts appear from the Judgment.

Messrs. *G. N Das* and *K. B Bagchi*—for the Petitioners.

Messrs. *A. C Gupta*, *B. C. Das* and *Monohar Chatterjee*—for the Opposite Party.

Order.—This Rule raises once more a question regarding the application of the Bengal Agricultural Debtors Act in the matter of stay of proceedings in an execution case in a Civil Court. The petitioners in this Rule are the judgment-debtors. There were three decrees upon which three execution cases were started. In Money Execution Case No. 87 of 1936 for a decreetal amount of Rs. 4,100 the sale took place on March 10th 1937, the auction-purchaser being a third party for a sum of Rs. 3,085. Before that date, on March 4th, 1937, an order for rateable distribution was passed in another Money Execution Case No. 86 of 1936. The actual amount to be distributed among the three decree-holders was not settled until January 19th, 1938. Before that on December 18th, 1927, notices under

Sec. 34, Bengal Agricultural Debtors Act were received. The learned Judge below by his order dated January 15th, 1938, refused to stay proceedings relying on the case in RAMENDRA NATH MONDAL v. DHANANJOY MONDAL (1). The contention of the petitioners is that the debt of the judgment-debtors had not been wiped out as a result of the sale on March 10th, 1937, because the question of rateable distribution was pending and that question was not decided until after the notice under Sec. 34, Bengal Agricultural Debtors Act had been received. This matter has come before us many times and among the cases previously decided the following have been cited: JAGABANDHU v. BHUSAL BEPARI (2), RAMENDRA NATH MONDAL v. DHANANJOY MONDAL (1), and JATINDRA MOHAN MONDAL v. ELAHI BUX (3). They do not support the petitioner but a distinction is sought to be made in his behalf on the ground that in all these cases the auction-purchasers were the decree-holders. But that distinction does not seem to be relevant since the decree-holder auction-purchaser is also liable to an order for rateable distribution under Sec. 73, C. P. Code. The trend of decisions of this Court is to the effect that once a sale has taken place, the debt has ceased to exist to the extent of the purchase price and therefore there is no proceeding pending with regard to the amount of the debt in the Civil Court and so at the stage notice under Sec 34, Bengal Agricultural Debtors Act can have no effect. As between the sale and the confirmation thereof various kinds of proceedings may take place, but those will not be treated as keeping the proceedings pending with regard to the debt which is mentioned in the notice. We are not prepared to extend the operation of the Act by reason of other matters coming in after the sale such as applications for rateable distribution, for setting aside a sale, and so on. This view is confirmed by the previous decisions of this Court. In that view, the order complained against should not be interfered with. The Rule is discharged with costs, hearing-fee one gold MOHUR to be divided amongst the two sets of opposite parties.

U.K.M.

(1) 11 R. C. 329 ; A. I. R. (1938) Cal. 261 ; 178 Ind. Cas. 186 ; 42 C. W. N. 218.

(2) 11 R. C. 343 ; A. I. R. (1938) Cal. 256 ; 178 Ind. Cas. 344 ; 42 C. W. N. 217.

(3) 42 C. W. N. 530.

(s c) I. L. R. (1939) 2 Cal. 168 ; A. I. R (1939) Cal. 394 ; 69 C. L. J. 480 ; 43 C. W. N. 636 ; 184 I C. 345 ; 12 Ind. Rul. Cal. 884.

Civil Rule No. 178 of 1939.

Present :—EDGLEY, J.

17th March, 1939.

BISWANATH DAS.

v.

KHEJERALI MOLLA.

Civil Procedure Code (Act V of 1908) R. 7 (3) Or. XXXIII,—Application —Forma pauperis—*Court-fees—Recovery of a sum of money—To pay Court-fee —Application to sue in* forma pauperis—*Rejecting the application to sue in* forma pauperis—*Refusing to allow the applicant to sue as a* pauper *under Or. XXXIII. R 7 (3)—To deposit the full Court-fee in respect of the relief, claimed—Limitation Act Sec. 14—Application to sue*—Mala fide *defect of jurisdiction.*

Held—That after the rejection of a pauper application, the Court had no power to give time for the presentation of a plaint or to treat that the old application as a plaint in the suit, with the result that, where an application to sue in *forma pauperis* is rejected, and the applicant seeks to deposit the full Court-fee in respect of the relief sought, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the requisite Court-fees and not at the date of the presentation of the petition to sue as a pauper.

Held again—That the observations made by the Judicial Committee in *Skinner v. Orde* (2 A. 241 ; 6 I. A. 126 ; 3 Suther 627 ; 4 Sar. 31 (P. C.) where applicable in such a case and they decided, on the basis of that decision that,

"if the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document on which proper Court-fee had not been paid by virtue of a refusal of the prayer of the plaintiff to sue as a pauper, the provisions of Sec 149, C. P. Code, could come to the assistance of the plaintiff."

Held also—That the expression "in the ordinary manner" can only mean that the applicant must present in Court, a duly stamped plaint which as regards limitation will be effective only from the debt on which it is presented.

Held further—That, even if application for the rejection of the pauper application were totally ignored, any discretion which the Court may have to convert a pauper application into plaint should not be used in a case.

Appeal against the order of the Munsif of Alipore of (24-Parganas.)

The facts appear from the Judgment.

Messrs. *G. N. Das* and *B. B. Das Gupta*—for the Petitioner.

Mr. *S. K. Chatterjee*—for the Opposite Party.

Order.—This Rule is directed against the order of the Third Munsif, Alipore, dated December 23rd, 1938, whereby he refused the petitioner permission to convert a plaint attached

to an application to sue in IN FORMA PAUPERIS into a regular plaint with effect from the date of the presentation of his pauper application and directed that the petitioner's plaint should be registered with effect from the date of filing court-fees in the Court below and not with effect from the date upon which the pauper application was presented. The relevant facts connected with this matter are briefly as follows: On April 11th, 1938, the petitioner applied in the Court of the learned Munsif to sue the opposite party IN FORMA PAUPERIS for the recovery of a sum of money alleged to be due to him by Khejer Ali Mollah, the opposite party, under a mortgage bond. The case was numbered as pauper case, 112 of 1938. While this particular case was pending, a similar application filed by the petitioner in case No. 88 of 1938 was dismissed by the learned Munsif on October 31st, 1938, on the ground that the applicant had the necessary means to enable him to pay the court-fees due in respect of the relief sought by him in that case. Thereafter the requisite steps were taken in connection with case No. 112 of 1938 to hear the matter under Or. XXXIII R. 7, C. P. Code. Hajiras were duly filed but on November 5th, 1938, the petitioner applied for time which was granted until November 26th, 1938, which day was fixed for the peremptory hearing of the case. On the latter date, the petitioner filed a further application for time in which he informed the Court that he did not think it proper to prosecute his application to sue IN FORMA PAUPERIS and asked that he might be allowed to carry on the suit by paying the proper court-fees, and by converting into a regular plaint the plaint which was filed with his pauper application. The learned Munsif on receipt of this application directed that the matter should be put up on December 17th, 1938, for further hearing. On this date the petitioner filed two further applications; in the first of these applications he repeated the request contained in the petition which he had filed on November 26th, 1938, and informed the Court that he had filed court-fees to the value of Rs. 90 payable on account of the relief sought by him in the mortgage suit. In the second application he asked that his original pauper application should be rejected and requested the Court to pass orders for the registration of the plaint attached to his pauper application on acceptance of the requisite court-fees. The learned Munsif heard the parties with reference to this matter and, on December 23rd, 1938, he then made the order against which this Rule is directed.

BISWA NATH DAS v. KHEJERALI MOLLA.

It follows from the recital of the abovementioned facts that as the matter stood before the learned Munsif on December 17th, 1938, he had been asked by the petitioner (1) to reject the application to sue IN FORMA PAUPERIS which had been filed on April 11th, 1938, and (2) to convert the plaint which was attached to and formed part of the original application into an ordinary plaint. It also appears to have been the wish of the applicant that the conversion should take effect from April 11th, 1938, in order that the relief sought by him in the mortgage suit might not become time-barred under the Law of Limitation. The learned Munsif by his order dated December 23rd, 1938, granted the petitioner's request to the effect that his pauper application should be rejected. From the circumstances in which the order was made, it must be taken to be an order under Or. XXXIII, r 7 (3), C. P. Code, refusing to allow the applicant to sue as a pauper. The learned Munsif also directed that the court-fees should be accepted with effect from December 17th, 1938, and not from the earlier date. This order, therefore, as it stands, would probably have the effect of making the petitioner's mortgage suit time-barred and it is on this account that he is anxious to have it set aside.

The question for consideration is whether, after refusing the petitioner's application to sue as a pauper on payment of the requisite amount of court-fees due in respect of the relief sought by the petitioner, the learned Munsif should have allowed the petitioner to convert his pauper application into a plaint with effect from the date on which the application to sue in forma pauperis was filed. In the first place, it may be mentioned that an unstamped plaint was attached to the original pauper application on April 11th, 1938. Or. XXXIII, r. 2, C P. Code, requires that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits. Having regard therefore to the express requirements of this rule, the unstamped plaint must be regarded as an essential part of the application to sue in forma pauperis, which standing alone, did not contain the essential particulars which the law requires in the case of plaints. The decision in this case mainly depends upon the view which should be taken of the effect of an order refusing an application, to sue in forma pauperis under Or. XXXIII, r. 7 of the Code and we are not directly concerned with the effect of a summary order of rejection under r. 5. After refusing a pauper application is it open to the Court to

treat the original application as a plaint in the suit or after such refusal, will it be necessary for the unsuccessful applicant to institute a fresh suit in the ordinary way? The views which have been taken with regard to this question in this Court and in other High Courts are by no means uniform. In AUBHAYA CHARAN DEY v. BISSESWARI (1) it was held that, after the rejection of a pauper application, the Court had no power to give time for the presentation of a plaint or to treat the old application as a plaint in the suit, with the result that, where an application to sue in forma pauperis is rejected, and the applicant seeks to deposit the full court-fees in respect of the relief sought, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the requisite court-fees and not at the date of the presentation of the petition to sue as a pauper. The learned Judges considered the effect of certain observations made with reference to pauper applications by the Judicial Committee of the Privy Council in SKINNER v. ORDE (2) but they held that that case was clearly distinguishable because in the matter before their Lordships of the Judicial Committee, there was no order rejecting the application. Although the learned Judges in AUBHAYA CHARAN DEY v. BISSESWARI (1) in the course of their judgment refer to the order of May 16th, 1891, as an order of rejection the order in question appears to have been made under Sec 409 of the Code of 1882, which corresponds to Or. XXXIII, r. 7 of the new Code It was not therefore an order of summary rejection but an order refusing the applicant permission to sue as a pauper..

A view contrary to that which was expressed in AUBHAYA CHARAN DEY v. BISSESWARI (1) was taken by this Court in JAGADISWARI DEBI v. TINKARI BIBI (3). In that case the learned Judges were dealing with a pauper application which had been refused but they held that the observations made by the Judicial Committee in SKINNER v. ORDE (2) were applicable in such a case and they decided, on the basis of that decision, that

"if the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document on which proper court-fee had not been paid by virtue of a refusal of the prayer of the plaintiff to sue as a pauper,

(1) 24 C. 889.
(2) 4 Sar. 31 (P. C.); 3 Suther 627; 6 I. A. 126; 2 A. 241.
(3) 8 R. C. 414; A. I. R. (1936) Cal. 28; 160 Ind. Cas. 586; 62 C. 711.

the provisions of Sec. 149 C. P. Code, could come to the assistance of the plaintiff."

It must therefore be considered which of these conflicting views is correct. The earlier view has been adopted by a Full Bench of the Allahabad High Court in CHUNNA MAL v. BHAGWANT KISHORE, (1) in which it was held that, if the Court has refused to allow an applicant to sue as a pauper under Or. XXXIII, r. 7 (3), C. P. Code, then the Court cannot under Sec. 149 of the Code allow the applicant to pay the requisite court-fee and to treat the application as a plaint. A similar view was taken by the Lahore High Court in ALOPI PARSHAD v. GAPPI (2). The later view is similar to that which was accepted by the Patna High Court in BANK OF BIHAR, LTD. v. RAMCHANDERJI MAHAREJ (3) and was followed by this Court in KALIDASI DASI v. SANTOSH KUMAR PAL (4). The decision in AUBHAYA CHARAN DEY v. BISSESWARI (5) appears to have been mainly based upon the provisions of Sec 413, C. P. Code of 1882, which has been reproduced with slight verbal alterations in the present Code as r. 15, Or. XXXIII, which reads as follows :

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays in costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper."

It is true that the Code of 1882 contained no section corresponding to Sec 149 of the present Code, but, even if such a section had been in existence at the time of the decision, it could have made no difference thereto in view of the lines of reasoning which was adopted by the learned Judges who decided AUBHAYA CHARAN DEY v. BISSESWARI (5). In order that Sec. 149

(1) 9 R. A. 145 (F. B.) ; (1936) A. L. R. 732 ; I. L. R. (1937) All. 22 ; (1936) A. L. J. 760 ; A. I. R. (1936) All. 584 ; 164 Ind. Cas. 305.
(2) 10 R. L. 2 ; 37 P. L. R. 158 ; A. I. R. (1937) Lah. 151 ; 169 Ind. Cas. 308 ; 7 L. 831.
(3) Ind. Rul. (1929) Pat. 521 ; 11 P. L. T. 55 ; A. I. R. (1929) Pat. 637 ; 118 Ind. Cas. 329 ; 9 Pat. 439.
(4) I. L. R. (1939) 1 Cal. 112 ; 11 R. C. 513 ; 179 Ind. Cas. 271 ; A. I. R. (1938) Cal. 730.
(5) 24 C. 889.

may become operative, there must be a document before the Court in respect of which the Court in its discretion may allow any deficiency of court-fees to be made good. The learned Judges decided that the original application could not be treated as a plaint after it had been rejected. It follows therefore that, in their view, there was no document before the Court in respect of which a provision such as Sec. 149 of the Code could have had any application. The decision in JAGADISWARI DEBI v. TINKARI BIBI (1) on the other hand, proceeded on the assumption that the plaint was still before the Court and had not been rejected by reason of the refusal to allow the applicant to sue in forma pauperis. In other words, that decision treated the original application as a sort of composite document consisting of a plaint plus an application to sue in forma pauperis. As already pointed out, the learned Judges who decided JAGADISWARI DEBI v. TINKARI BIBI (1), based their decision mainly upon certain observations made by the Judicial Committee of the Privy Council in SKINNER v. ORDE (2). Their Lordships in the later case were dealing with the case of an applicant who, after prosecuting for some time a bona fide application to sue in forma pauperis, pending an enquiry into his pauperism, obtained funds which enabled him to pay the court-fees. No order had been passed refusing him permission to sue as a pauper, but, having regard to the circumstances of the case, he was allowed to convert his original application into a plaint with effect from the date upon which that application was filed. The case in question was decided under the C. P. Code of 1859. Secs. 308 and 310 of which have been slightly re drafted and reproduced in the present Code as rr. 8 and 15 of Or. XXXIII. Their Lordships pointed out that :

"the Act provides what shall happen if the prayer of the petition be granted by Sec. 308 It also provides by a Sec. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that unless the petition was rejected, as it contended all the materials of the plaint, it should operate as a plaint without the necessity of filling a new one."

They went on to say:

"There are no negitive words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactment which would

(1) 8 B. C. 414 ; A. I. R. (1936) Cal. 28 ; 160 Ind. Cas. 586 ; 62 C. 711.
(2) 4 Sar. 31 (P. C.) ; 3 Suther 627 ; 6 I. A. 126 ; 2 A. 241 .

oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees be considered as a plaint from the date that it was filed."

There conclusion was to the effect that in the circumstances of the case:

the petition to sue as a pauper became a plaint, and under the statute the suit must be deemed to be instituted when that application was filed."

They were, however, carefull to point out that

"supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different."

As point d out by Sulaiman, C. J. and Bennet, J. in the Allahabad decision cited above, there Lordships of the Judicial Committee nowhere stated that, even if the application to sue as pauper be rejected the plaint still stands and remains undisposed of untill some seperate order is passed with reference to it. On the other hand, it was apperant that their Lordships intended to lay down that, where an application was granted, the position was governed by the old Sec. 308, and where the application was rejected, the position was governed by Sec. 310. In my view the decision of the Judicial Committee of the Privy Council as it stands, is merely an authority for the proposition that on the analogy of the provisions of Sec. 308 of the Code of 1859, which corresponds with r. 8, Or. XXXIII of the present Code, a bona fide applicant to sue Forma pauperis, whose application has not been already refused, may be allowed to convert his application into a plaint which after it has been so converted should be deemed to have been filed on the date upon which the original application was presented to the Court. It is, however, quite clear from the terms of the judgment that their decision would have been different if they had been dealing with a case in which the petitioner's application had been refused under Sec 306 (which corresponds to Or. XXXIII, r. 7 of the new Code) or with a matter in which the applicant had presented a pauper application mala fide or with intent to defraud the revenue.

It follows therefore that having regard to the provisions of Or. XXXIII, r. 8, C. P. Code, the original application should be deemed to be the plaint in the suit when the application to sue in forma pauperis is granted. It may also be so treated in

the case of a bona fide application in circumstances such as those which were present in the case with which their Lordships of the Judicial Committee were dealing in SKINNER v. ORDE (1), and JANAKDHARY SUKUL v. JANKI KOER (2). Different considerations, must, however, apply when, as in the present case, an application to sue in forma pauperis has been refused under the provisions of Or. XXXIII, r. 7 (3), C. P. Code. In such a case the applicant clearly comes within the scope of Or. XXXIII, r. 15, of the Code. The order of refusal will therefore act as a bar to any subsequent application of the like nature by him in respect of the same right to sue, but he will be at liberty to institute a suit in the ordinary manner in respect of such right provided he first pays the costs incurred by Government and by the opposite party in opposing his application for permission to sue as a pauper.

It seems to be quite clear from the language of r. 15 that the intention of the Legislature is not to allow an unsessful applicant to treat his pauper application as a plaint with effect from the date on which it was originally filed. It allows him to institute a suit in the ordinary manner in respect of the right which he claims but only after he has paid the costs due to Government and the opposite party. In my view the expression "in the ordinary manner" can only mean that the applicant must present in Court a duly stamped plaint which as regards limitation will be effective only from the date on which it is presented. Such plaint must fulfil all the requirements of Or. VII, C. P. Code. If it had been intended that, after refusal to allow the applicant to sue as a pauper, the suit might be continued on the basis of the original application, there is little doubt that language similar to that which has been used in r. 8 would have been employed in r. 15. Rule 8 expressly stated that, where the application is granted, such application shall be deemed to be the plaint in the suit. No such language has been used in r. 15 and to my mind the manner in which this Rule has been drafted indicates clearly that any suit which the applicant may wish to file under this Rule shall not relate back to the original pauper application but must proceed upon the basis of fresh plaint presented in the ordinary manner. The Rule was probably deliberately framed with the intention

(1) 4 Sar. 31 (P. C.); 3 Suther 627; 6 I. A. 126; 2 A. 241.
(2) 18 C. 427.

of discouraging frivolous or dishonest applications to sue in forma pauperis. In this connection, I agree with the views expressed by Abdul Rashid, J, in ALOPI PARSHAD v. GAPPI (1). In that case the learned Judge observed that :

"the application to sue in forma pauperis is a potential plaint. If it is rejected under r. 5 or r. 7, it never ripens into a plaint. If the application ripens into a plaint, then the date of the institution of the suit shall relate back to the date of the filing of the application to sue in forma pauperis. If on the other hand such an application is rejected, it cannot be deemed to be a plaint and the payment of the court-fee after the application to sue in forma pauperis has been rejected cannot revive a potential plaint which ceased to exist when the application to sue in forma pauperis was rejected."

The learned Judge went on to say :

"Where therefore an application for leave to sue in forma pauperis is rejected under Or, XXXIII, r. 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting the plaintiff permission to pay court-fees cannot be deemed to be one under Sec. 149 and the suit must be held to have been instituted on the day on which the court-fee is paid."

The learned Advocate for the petitioner places some reliance upon the provisions of the Explanation to Sec. 3, Limitation Act, which states that, in the case of a pauper, a suit is instituted when is application for leave to sue as a pauper is made but, as pointed out by Banerji, J. in JANAKDHARY SUKUL v. JANKI KOER (2) :

"This provision must no doubt be taken to have reference to a case in which such application is granted, and it is not intended to apply to a case in which the application to sue as a pauper is rejected."

It follows from what I have stated above that, in my opinion, the correct view of the law has been taken in AUBHAYA CHARAN DEY v. BISSESWARI (3), and I am not prepared to follow the later decision in JAGADISWARI DEBI v. TINKARI BIBI (4). In this view of the case, the learned Munsif, after refusing the petitioner's application to sue as a pauper quite properly refused to allow him to convert his application into a plaint with effect

(1) 10 R. L. 2 ; 39 P. L. R. 158 ; A. I. R. (1937) Lah. 151 ; 169 Ind. Cas. 368 ; 17 L. 831.
(2) 28 C. 427.
(3) 24 C. 889.
(4) 8 R. C. 414 ; A. I. R. (1936) Cal. 28 ; 160 Ind. Cas. 586 ; 62 C. 711.

from the date, upon which the pauper application was filed. The only point in which his order, dated December 23rd, 1938, may be said to be incorrect is with reference to his decision to the effect that the applicant should register his plaint with effect from the date on which the court-fees were filed. Having regard to the provisions of Or. XXXIII, r. 15, C. P. Code, the correct order would have been to direct payment by a specified date of the costs (if any) incurred by Government and the opposite party in opposing the pauper application as a condition precedent to the acceptance of a plaint to which the Court might have permitted the court-fee stamps to be attached which had been deposited on December 17th, 1938. If it be held that the decision in AUBHAYA CHARAN DEY v. BISSESWARI (1), contains a correct statement of the law, I am nevertheless asked to apply the principles laid down in Sec. 14, Limitation Act, and to deduct the period during which the petitioner was prosecuting his pauper application. In support of this argument some reliance is placed upon the judgment of S. K. Ghose, J. in KALIDASI DASI v SANTOSH KUMAR PAL (2). That case is however distinguishable from the one with which we are now dealing because, having regard to the particular circumstances of the case, this Court did not accept the finding of the District Judge to the effect that the pauper application was not a bona fide application In the present case I am not prepared to disagree with the clear finding of fact contained in the order of the learned Munsif to the effect that the application was mala fide. That being the case, Sec. 14, Limitation Act, can have no application and, in any case, it cannot be said that the learned Munsif "from defect of jurisdiction or other cause of a like nature" was unable to entertain the petitioner's application. This argument must, therefore, fail.

Finally, I am asked to ignore the application which was filed on December 12th, 1938, in which the petitioner asked for the rejection of his pauper application and to treat the matter as being in substance merely an intimation to the Court that the petitioner did not wish to proceed with his original application and as a prayer for the conversion of that application into a plaint. It is contended that, in that event, the matter would

(1) 24 C. 889.

(2) I. L. R. (1939) 1 Cal. 112 ; 11 R. C. 513 ; 179 Ind. Cas. 271 ; A. I. R. (1938) Cal. 730.

be governed by the principles laid down by the Judicial Committee in SKINNER v. ORDE (1). In the circumstances of the case, I am not prepared to accede to this request According, to the finding of the learned Munsif the petitioner's pauper application was filed with an intent to defraud Government. It is clear from the judgment of the Privy Council in the case cited above that their Lordships would have been guided by different considerations if fraud had been found by the Judge and in my view, even if application for the rejection of the pauper application were totally ignored, any discretion which the Court may have to convert a pauper application into a plaint should not be used in a case such as that with which we are now dealing. In view of what I have stated above, this rule must be discharged with costs subject to a direction to the learned Munsif to fix a date by which the costs (if any) incurred by Government and the opposite party in opposing the application may be deposited as a condition precedent to presenting a fresh plaint with the court-fees which have already been filed in Court. Limitation will run from the date on which the plaint is actually presented. The hearing-fee is assessed at five gold MOHURS.

M.

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(1) 4 Sar. 31 (P. C.); 3 Suther 627; 6 I. A. 126; 2 A. 241.

(s. c.) A. I. R. (1939) Cal. 423; 12 Ind. Rul. Cal. 217; 43 C. W. N. 794; 184 I. C. 216.

Civil Appeal No. 152 of 1937.

Present:—HENDERSON and LATIFUR RAHMAN, JJ.

13th March, 1939.

MUHAMMAD AZIZAL BARI.

v.

MOULVI RAZIUDDIN MUHAMMAD IDRIS KHAN and another.

Kabuliyat—*Lease—Terms of lease—General rule of construction—Indefinite nature enures for the life of the grantee—Lease enure for the life time—Lease for indefinite period—Transfer of property Act Sec. 106,—Grant.*

The construction of the *Kabuliyat* is the main point for determination. The terms of the *Kabuliyat*, it is apparent that the *jote* is not a permanent one.

MUHAMMAD AZIZAL BARI v RAZIUDDIN.

Held that—Clearly, intention seems to be to allow the lessee to continue for an indefinite period so long as he pays the rent regularly and performs other conditions of the lease.

Held that—That the general rule of construction that a grant of an indefinite nature endures for the life of the grantee should apply.

Held again—That if a grant be made to a man for an indefinite period it enures generally speaking for his life time and passes no interest to his heirs unless there are some words showing an intention to grant an hereditary interest. (Babu Lekhraj Roy v Kunhya Sing (P. C.) I. A. 223 at p. 224.

Held also—That the reasonable inference to make from the terms of the lease is that it was intended to enure for the life time of the grantee.

Appeal against the decree of the Sub-Judge of Pabna and Bogra.

The facts appear from the Judgment.

Mr. *J. K. Sen Gupta*—for the Appellant.

Messrs. *G. C. Sen* and *Abdul Bari*—for the Respondents.

Latifur Rahman, J.—This is an appeal by the plaintiff arising out of a suit for recovery of khas possession in respect of a piece of land, after evicting the defendants and removing certain structures erected thereon. Notice to quit was served on the defendants on the footing that the tenancy was a tenancy-at-will The land in dispute is situated within the Municipality of Bogra and appertains to the wakf estate of which the plaintiff is the present mutawali. One Muhammad Gohar Ali created a sarasari jote in respect of the land in dispute in favour of the defendant No. 1's father by kabuliyat in 1307 B.S., Ex. 8. Thereafter defendant No. 1's father made a gift of the said jote to defendant No. 1 by a hiba-bil-ewaz in 1328 B.S. The wakf estate was created by a wakfnamah in 1321 B.S., Ex. 1. While the plaintiff's father was a mutawalli, defendant No. 1 obtained a fresh sarasari bandobast of the disputed land from him by a kabuliyat Ex. 3 (a) on Chait 30, 1334 B.S. The plaintiff in whose favour his father relinquished the mutawallship instituted the present suit alleging that defendant No. 1 took the settlement for residential purposes as a tenant-at-will, on an annual rent of Rs. 31 and while in possession admitted defendant No. 2 to a portion of the land without the plaintiff's knowledge and consent and that notice under Sec. 106, Transfer of property Act, to quit the land was served upon the defendants. The contention of the defendants was that the tenancy in question was a "sarasari miyati

tenancy," that it was a tenancy for the lifetime of the lessee and not a tenancy-at will or from year to year. They also denied that any notice was served on them. The material terms of the kabuliyat Ex 3 (a) are as follows :

"There being no custom of transferability in respect of *sarasari jote* in Pargana Sholbara, I have acquired no right by the aforesaid *kibu-bil-ewaz* and you having been ready to bring suit for ejecting me from the said *jote*, I have appeared before you and have applied for taking a new settlement of the aforesaid lands. You have granted my prayer and upon settlement of the said lands as a new *sarasari jote* at an annual rent of Rs. 31 you have demanded a *kabuliyat* from me . . I shall maintain the trees which are now in existence in the aforesaid *jote* and which will grow and be planted then in future. I shall not be able to cut away the said trees or their branches . . . . I shall not be able to build any brickbuilt house on the said lands, nor shall be able to cause any damage to those lands by digging any pits thereon. I shall be able to cause any damage to those lands by digging any pits thereon. I shall be able to make the floors of any houses that I may build thereon, *pucca* and to build brickbuilt boundary walls and to make the opening of any wells dug therein made of bricks and to build privies with corrugated iron roof. But by the said acts my *jote* will not be changed to a permanent one, it will remain as *sasasari jote* as before. By the said acts the said *jote* will not be regarded as a *mokasari* or *mourashi jote* nor shall I be able to claim it as such . . .

"I shall not be able to introduce any musician, prostitute or any man of bad character or a thief or a person dealing in hides nor shall I be able to let out these to them. If I do such act, I shall be ejected therefrom . . ."

The construction of the kabuliyat is the main point for determination. From the terms of kabuliyat it is apparent that the jote is not a permanent one. Under certain conditions the defendants are even liable to be evicted. If it is not a permanent jote or mokarari or mourashi then the question may well arise as to whether it is a tenancy-at-will or from year to year. Although in specific terms a permanent lease is not created by the kabuliyat, yet the lessee has been given certain advantages, e.g. building a boundary wall, pucca floors and is not liable to be evicted unless he introduces bad characters, musicians, prostitutes and hide dealers. Clearly, the intention seems to be to allow the lessee to continue for an indefinite period so long as he pays the rent regularly and performs other conditions of the lease. In such a case, we are of opinion, that the general rule of construction that a grant of an indefinite nature enures for the life of the grantee should apply, as was pointed out by their

MUHAMMAD AZIZAL BARI v. RAZIUDDIN.

Lordships of the Judicial Committee in BABU LEKHRAJ ROY v. KUNHYA SINGH (1) that

"if a grant be made to a man for an indefinite period, it enures generally speaking, for his lifetime and passes no interest to his heirs unless there are some words showing an intention to grant an hereditary interest."

In the present case, there are no such words used in the kabuliyat that there is any heritable interest. The trial Court has held that the lease must enure for the lifetime of defendant No. 1, and as such, he is not liable to be evicted and dismissed the suit. The Court has followed the decision in ASHUTOSH LAHIRI v. CHANDI CHARAN MITRA (2). There the terms of the lease were as follows :

"You having applied to get settlement of 6 *kanis* of land as described in the schedule below for the purpose of constructing your *baska*, I hereby fix annual rent for the 6 *kanis* of land at Rs. 3 and settle the *sama* with you. You shall enjoy and possess the said land by constructing your *baska* and residing therein regularly paying rent."

The learned Judges held that in view of the terms of the lease, it would be right to apply to it the general rule of construction which is to the effect that if a grant is made to a man for an indefinite period, it enures generally speaking at least for the lifetime of the grantee unless there were some words showing the intention that a heritable grant was made : see also CHANDI CHARAN MITRA v. ASHUTOSH LAHIRI (3). The lower Appellate Court has dismissed the appeal upholding the decision of the Court below. On behalf of the appellants reliance has been placed on the case in LAKSHMAN CHANDRA v. CHARU CHANDRA (4). There one of the terms of the kabuliyat was as follows : " . . . nor shall I acquire any right to transfer by way of gift or sale or any other legal right." The learned Judges deciding the case observed in their judgment :

"But the clause to which we have referred and which provides that the lessee shall acquire no legal rights by which we understand that he shall not acquire any other legal right under the lease is a clause which, in our opinion, makes a good deal of difference."

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(1) 4 I. A. 223 at p. 224 ; 3 C. 810 ; 3 Sar. 758 (P.C.).
(2) 31 C. W. N. 46 ; A. I. R. 1927 Cal. 179 ; 99 I. C. 200.
(3) 164 I. C. 837 ; 9 R. C. 290 ; 40 C. W. N. 52.
(4) 62 C. L. J. 111 ; 159 I. C. 613 ; 8 R. C. 331 ; A. I. R. 1935 Cal. 783.

and accordingly held that the kabuliyat did not create in favour of the lessee any interest which can be held to be anything more than a tenancy-at-will The case is thus clearly distinguishable The other cases namely, JANKI NATH ROY v. DINA NATH KUNDU (1), SARAT CHANDRA v. JADAV CHANDRA (2), SECRETARY OF STATE v. MADHUSUDAN (3), CHANDI CHARAN MITRA v. ASHUTOSH LAHIRI (4) and MOHIM CHANDRA SARKAR v. ANIL BANDHU ADHIKARI (5) which were cited, did not support the contention of the appellant. We are of opinion that the Courts below have correctly construed the document Ex. 3 (a). The land being taken for residential purposes and being situated within the Municipal area, there is no substance in the cross-objection by defendants that the tenancy should be governed by the provisions of the Bengal Tenancy Act, and not by the Transfer of Property Act The cross-objection accordingly fails, and the appeal is dismissed with costs.

Henderson, J.—I have had the advantage of reading the judgment which has just been delivered by my learned brother and have little to add. The main question for our decision in this case is whether a certain rule of construction still applies. That rule was formulated in these terms by Mukherji, J. in ASHUTOSH LAHIRI v. CHANDI CHARAN MITRA (6).

"The general rule of construction is to the effect that if a grant was made to a man for an indefinite period, it enures, generally speaking, at least for the lifetime of the grantee unless there were some words showing the intention that a heritable grant was made."

On behalf of the appellant it has been contended that that rule is inconsistent with the terms of Sec. 106, Transfer of Property Act, and that therefore since that enactment was passed, the rule has no longer any force. The result would be that decisions to the contrary effect made since the passing of the Transfer of Property Act would not be good law. On the

(1) 61 M. L. J. 377 (P. C.) ; Ind. Rul. (1931) P. C. 268 ; 35 C. W. N. 982 ; A. I. R. (1931) P. C. 207 ; 133 I. C. 732 ; 54 C L. J. 412.
(2) 27 C. L. J. 198 ; 21 C. W. N. 206 ; A. I. R. (1918) Cal. 906 ; 37 I. C. 956 ; 44 C. 214.
(3) Ind. Rul. (1933) Cal. 187 ; A, I. R. (1933) Cal. 260 ; 141 I. C. 833 ; 36 C. W. N. 918.
(4) A. I. R. (1926) Cal. 558 ; 94 I. C. 684 ; 53 C. 95.
(5) 9 C. L. J. 362 ; 1 I. C. 66 ; 13 C. W. N. 513.
(6) 31 C. W. N. 46 ; A. I. R. 1927 Cal. 179 ; 99 I. C. 200.

other hand, it has been contended on behalf of the respondents that Sec. 106 does not have that effect. The relevant words in that section are these, "in the absence of a contract to the contrary." Now, this rule is a rule of construction and, if it is a good rule, the result is that when it applies there is a contract to the contrary. In our opinion, this contention made by Mr. Sen on behalf of the respondents must be accepted. The only authority against him is the case in MOHIM CHANDRA SARKAR v. ANIL BANDHU ADHIKARI (1). The result is that the overwhelming weight of authority in this Court is to the effect that this rule of construction ought to be applied in spite of the terms of Sec. 106, Transfer of Property Act. Apart from the application of this general rule of construction, the Courts below have construed the lease as one for the life of the grantee by its very terms. I agree with that view. If Sec. 106, Transfer of Property Act applies, the lease is a monthly one. The provision for annual rent is enough to show that it is not. It is also specifically provided that it is not permanent. The learned Judge then pointed out certain terms which are not really consistent with the mere annual lease. Hence, the reasonable inference to make from the terms of the lease is that it was intended to enure for the life-time of the grantee. The cross-objection was not passed and was also misconceived. The only part of the decree which was against the respondent was the failure to award him costs. Although the ground taken in the cross-objection might have been urged as a ground for supporting the decree made by the lower Appellate Court, it cannot form the subject-matter of a cross-objection.

M.

(1) 9 C. L. J. 362 ; 1 I. C. 66 ; 13 C. W. N. 513.

(s. c) I. L. R (1939) All. 577 ; 12 Ind. Rul. (Cal.) 243 ; 184 I. C. 511 ;
(1939) A. L. J. 440 ; A. I. R. (1939) All. 548.

Appeal No. 257 of 1937.

Present :—BENNET AND VERMA, JJ.

16th February, 1939.

Sreemati DROPODI

v.

BANKEY LAL and others.

Partnership—Contract—Intention of the executants of the dead—Partnership Act (IX of 1932) Sec. 44—Suit for dissolution—Dispute—Arbitration—Adequate relief—Conduct of the business—Contract Act (IX of 1872) Sec. 254 (6).

Held that—It was the intention of the executants of the document that the partnership shall not be dissolved on the happenning of the contingencies mentioned in the Partnership Act.

Held again—That the deed of agreement, enable the plaintiff to withdraw from the Partnership if he or she feels that it is no longer profitable to continue to be a partner the term of the agreement is legal and hence the plaintiff is not entitled to bring a suit for dissolution.

Appeal against the decision of the Civil Judge of Aligarh.

The facts appear from the Judgment.

Sir. *T. B. Sapru* and Messrs. *S. N. Sen*, *Punna Lal* and *Jowahir Lal*—for the Appellant.

Sir. *Wasir Hasan* and Messrs. *P. L. Banerjee*, *S. K. Dhar*, *Hariban Sahai*, *M. A. Asis*, *S. B. L. Gour*, *Bankey Lal*, *Mansur Alam*—for the Respondent.

Verma, J.—This is a plaintiff's appeal. The suit as originally framed asked for the following reliefs :

"(*a*) The partnership of the firm known as Lallu Mal Hardeo Das Cotton Sipinning Mills, Hathras, may be dissolved and the accounts may be taken from the defendant's manager from the beginning of the partnership and whatever amount may be found due to the plaintiff, the same may be awarded to her and inasmuch as the correct sum due to the plaintiff cannot be fixed just now without the rendition of account, the valuation of the suit is fixed at Rs. 5,100 and the court-fee has been paid thereon. If according to the accounts the sum due to the plaintiff be found in excess of the said sum, in that case a decree may be passed in favour of the plaintiff for the sum so found due on taking additional court-fee and necessary directions for the dissolution of partnership may be issued and after appointing Receiver all the proceedings may be taken in connection with the dissolution of the partnership."

At a subsequent stage, the plaintiff applied for the amendment of the plaint by the addition of what now appears as relief (b) which is as follows :

"(*b*) If the Court holds the partnership between the parties to have been dissolved, defendant No. 1 be ordered to render the accounts of the partnership from 1921 up to this day to the plaintiff and a decree for the amount and property which may be found as belonging to the plaintiff on account of her share may be passed in her favour—laid at Rs. 5,100 as an alternative relief."

Her application was granted and that relief was added. The Court below has dismissed the suit. The suit relates to a firm styled Lallu Mal Hardeo Das Cotton Spinning Mill's Co., Hathras, which has its headquarters at Hathras. It appears that a partnership was entered into some time in the year 1920 and business was started. Subsequently it was considered desirable to reduce the terms of the contract of the partnership to writing and a deed was executed on April 4th, 1923. This document is Ex. A-1 on the record. We shall presently have occasion to refer to some of the relevant provisions of this deed. The reasons for seeking the dissolution of this firm are given by the plaintiff in paras 10 and 11 of the plaint, the main plea being that defendant No. 1, Bankey Lal, who is the manager of the firm, does not manage the business in a manner which may be profitable to the partners and does not maintain proper accounts. The plaintiff impleaded 24 persons as defendants to the suit. Of these 24 defendants, seven, namely, defendants Nos. 1, 3, 4, 5, 9, 14 and 16, filed written statements contesting the suit, while five, namely defendants Nos. 6, 7, 8, 11 and 18, filed written statements in effect supporting the plaintiff. Various pleas were taken in defence by the defendants who opposed the plaintiff's claim and a number of issues were framed. The main ground on which the Court below has dismissed the suit is that the plaintiff has not got a right to sue for dissolution which is the only ground with which we are concerned in this appeal. The deed Ex. A-1 after reciting the history of the business lays down a number of terms by which the executants agreed to be bound. The following paragraphs are important and we consider it necessary to quote them in extenso.

"16. No partner or his heir or representative shall have power to sell his share or to withdraw from the partnership in any way other than that mentioned below.

17. It shall be the duty of the partner, desiring to withdraw himself from the partnership of the factory, to sell his share in the manner given below. In

case the company is not in a position to purchase the said share or to have it sold in any way, the partner desiring separation shall have power to have the partnership dissolved and thus withdraw himself from the partnership.

18. The partner desiring to transfer his share shall have to give a registered notice to the company allowing three months time, so that it may either purchase his share itself at the price fixed by it according to para. 28 or may get the same sold in any other way. On receipt of the notice, an emergent meeting of the company will be held within 30 days in which it will be decided whether the company is ready to purchase the share or not. If it is decided by opinion of the majority that the company should purchase the share, it shall purchase it itself, otherwise it shall allow those partners to purchase it who might be willing to do so, at the price mentioned above. If no partner is ready to purchase the said share, the company shall get it sold in any way it thinks proper. If the company fails to have it sold within three months, the partner seeking separation or the partner making the sale shall have power to transfer his share to anyone.

19. If any partner, contrary to the conditions of this agreement, shall transfer his share to any person who is a partner or stranger, the company and its partners shall have the right of pre-emption and the price fixed according to para 28 of this agreement shall be paid.

20. Any of the partners willing to purchase the share of another partner shall be in duty bound to attend the general or emergent meeting of the partner to be held according to the conditions mentioned above and show his readiness for the purchase in the meeting. If the intention of purchase is not expressed (by any partner) in the meeting, he shall have no right of purchase as against the other partners. In case there are more than one partner willing to make the purchase, the said share be transferred to them in proportion to the shares held by them in the company.

21. The partnership shall not be dissolved on account of the death of any person. On the ground of insolvency, insanity, etc., of any person, no partner shall have power to have the partnership dissolved through Court.

22. The partner shall not be authorized to remove any one from partnership, but if the partnership of any partner is found prejudicial to the company's rights or if there is loss or apprehension of any loss to the company by his remaining a partner, the partners shall be authorised to remove him from partnership by holding an ordinary or emergent meeting, but the defaulting partner shall be given full opportunity to set up a defence in the meeting. In the case of separation of his share, his money, according to the fixed rate in para. 28 shall be paid to him after which he shall cease to have any right."

Paragraph 34 provides that Lala Bankey Lal shall be the manager and Lala Ganpat Lal the assistant manager. It lays

down further provisions as to the appointment of a manager in the future. Paragraph 35 provides for the remuneration of the managers and para 38 deals with their powers. Then we have para 49 which also may be quoted in extenso.

"49. All the partners shall work amicably and with co-operation. If, God forbid, any dispute arises, it shall be settled by a punchayat out of Court and Lala Lallu Mal, Lala Ram Dayal and Lala Ganpat Lal shall be appointed as arbitrators and no suit shall be filed. In case any suit is filed, it shall be fit to be dismissed. If any of the said arbitrators is not able to act as an arbitrator in respect of anything on account of some proper reason, some other proper arbitrator shall be appointed in his place."

It seems to us that it is not necessary to consider all the grounds which the Court below has taken against the plaintiff and that this appeal can be disposed of on the short ground that under the contract enterted into by the plaintiff with the other partners she has no right to bring a suit for dissolution of the partnership. It seems to us that on a true interpretation of this document, Ex. A-1, there can be no doubt that the predominant intention of the executants of the deed was that this firm shall continue to carry on business without running the risk of being brought to an end at the instance of one of the partners who did not agree with the rest. It may also be mentioned here that there are provisions in this deed for business being conducted according to the advice of the majority of the partners, e.g. paras. 12 and 14. It is further clear that this is not a case in which a partner who is dissatisfied with the conduct of the business or apprehends loss has no other remedy than dissolution. The paragraphs which we have quoted above, namely 16 to 20, provide for a machinery by which such a partner can obtain adequate relief. It is common ground that the plaintiff never expressed any desire to withdraw from the partnership and never gave any notice as provided in para. 18. It seems to us clear that it was the intention of the executants of this document that the partnership shall not be dissolved on the happening of the contingencies mentioned in the Partnership Act. It is further important to note that para. 49 quoted above makes a clear provision for the settlement of any dispute that may arise by arbitration. That such a contract is not against law is made clear by the first exception to Sec. 28, Contract Act.

Learned Counsel for the plaintiff appellant has relied on Sec. 44, Partnership Act (IX of 1932), and has argued that,

whenever any of the circumstances mentioned in the section exists, a partner is entitled to bring a suit for dissolution. His contention is that according to the allegations in the plaint, the circumstances specified in cls. (c) and (d) of the section exist in this case, and he complains that the Court below was not justified in dismissing the suit on the preliminary ground that the plaintiff had not the right to claim dissolution for the enforcement of which she could bring the suit, and urges that the Court below should have taken evidence and should have recorded findings as to the truth of otherwise of the allegations of fact made by the plaintiff in para. 10 of the plaint and should have passed a decree for dissolution of the partnership if those allegations were found true He further contends that the opening words of Sec 11 of the Act, "subject to the provisions of this Act," should be interpreted to mean "subject to Sec. 44 of this Act." It seems to us, however, that those words mean that the relations of partners shall be governed by contract unless the contract that they enter into is one which he prohibited by any provision in the Act. Learned Counsel has further relied on the case in RAHMATUNNISSA BEGUM v. PRICE (1). The defendants in that case, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay and they entered into an agreement of partnership with Nawab Kamal Khan. The partnership was for the purpose of quarrying and supplying the requisite granite and other stone. Clause (4) of the deed of partnership provided that :

"working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the dock was completed and that the partnership should then terminate and be would up"

It was common ground that the business resulted in a considerable loss from the very start. It was in these circumstances that the Nawab filed the suit giving rise to the appeal for a dissolution of the partnership and for accounts, alleging that he was entitled to sue for the reliefs claimed in accordance with the provisions of Sec. 254 (6), Contract Act IX of 1872, which provided that at the suit of a partner the Court may dissolve the partnership when the business of the partnership can only be carried on at a loss. The defendants pleaded that

(1) 12 Bur. L. T. 91 (P. C) ; 35 M. L. J. 262 ; 20 Bom L. R. 714 ; 8 L. W. 53 ; 23 M. L. T. 400 ; 5 P. L. W. 25 ; 27 C. L. J. 623 ; 16 A. L. 513 ; 22 C. W. N. 601 ; 45 I. A. 61 ; A. I. R. (1917) P. C. 116 ; 45 I. C. 568 ; 42 B. 380.

in view of the terms embodied in cl. 4 of partnership, the suit was premature and that the partnership could not be dissolved until the supply of granite and other stone for the construction of the dock was completed, and Sec. 252, Contract Act, was relied upon. As already stated, it was matter of admission that the business had resulted in a loss from the very beginning and that of June 30th, 1910, the loss amounted to upwards of Rs. 3 lacs. The Court of first instance decided in the Nawab's favour and decreed the suit for dissolution and for an account to be taken from March 11th, 1908, to October 14th, 1910. On appeal, the appellate Bench of the High Court of Bombay differed from the trial Judge as to the effect of cl. 4 of the deed of partnership and held that the suit when instituted was premature and that the plaintiff was not entitled to have the partnership dissolved when the suit was brought, as the work had not been completed at that time. Finding that the work had been completed since, it held that no useful purpose would be served by dismissing the suit on that ground. In the result it varied the decree of the trial Court by directing that the account should be taken from March 11th, 1908, down to the date when the work was completed and by ordering the plaintiff to pay the costs in Issues Nos. (1) and (2) which related to the plea of the defendants mentioned above. Their Lordships of the Judicial Committee held that the Appellate Bench was not right in the view that it had taken of the effect of cl. 4 and of Sec. 252, Contract Act. It was observed :

"Their Lordships are unable to agree with the High Court's view that there is anything in Sec. 252 that constitutes a bar, it appears to them to be directed to something wholly different."

Their Lordships then observed that a partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the right and obligations of the partners may have been regulated and defined by the partnership contract, and that no man can exclude himself from the protection of the Courts. It was further held by their Lordships that, in all the circumstances of that case which were considered in detail by their Lordships, the trial Judge has exercised a sound discretion and that the Appellate Court had no sufficient grounds for interfering with the discretion of the trial Judge. It seems to us that that is a wholly different case.

The essential feature of the case was that the undertaking had been carried on with the one and unvarying result of annual loss from the very commencement. It may also be pointed out that the provisions contained in Sec. 252, Contract Act, were different from those contained in Sec. 11, Partnership Act of 1932. Sec. 252, Contract Act, lays down :

"Where partners have by contract regulated and defined as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them which consent must either be expressed, or be implied from a uniform course of dealing ?"

whereas Sec. 11, Partnership Act, provides :

"Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing."

It seems to us that it was in view of the language of Sec. 252, Contract Act, that their Lordships observed that it appeared to be directed to something wholly different. In our opinion, Sec 11, Partnership Act, has deliberately been so worded by the Legislature as to make it clear that the relationship of the partners shall be determined by the contract between them subject of course to the provisions of the Act. As to the meaning of these words in Sec. 11, we have already expressed our view above. It seems to us that the case before us is governed by the decision of their Lordships of the Privy Council in COWASJEE NANABHOY v. LALLABHOY VULLUBHOY (1). where their Lordships have laid down that it is open to partners to enter into an agreement by which they renounce their right of dissolution. We may also point out that in their judgment in RAHMATUNNISSA BEGUM v. PRICE (2) their Lordships observed that in the circumstances of that case a decree for dissolution was the appropriate protection which could be given by the Courts to the plaintiff. That is not the case before us. As we have pointed out above, the deed of agreement, Ex. A-1, enable the plaintiff to withdraw from the partnership if she feels that it is no longer profitable for her to continue to be a partner.

(1) 3 Sar 645 P C; 25 W R 78; I B 468; 3 I A 200;
(2) 12 Bur. L. T. 91 (P. C.) ; 35 M. L. J. 262 ; 20 Bom. L. R. 714 ; 8 L. W. 53 ; 23 M. L. T. 400 ; 5 P. L. W. 25 ; 27 C. L. J. 623 ; 16 A. L. 513 ; 22 C. W. N. 601 45 I. A. 61 ; A. I. R. (1917) P. C. 116 ; 45 I. C. 568 ; 42 B. 380.

It may also be pointed out that it has not been alleged in the plaint that the business of the partnership has ever resulted in loss so far. On the contrary, there are the report of the Commissioner appointed by the Court below which show that the concern was working at considerable profit. At p. 45 of the paper-book the Commissioner gives the result of his examination of the books of the partnership and finds that the profits for the three years, 1933 to 1935 amounted to Rs. 1,92,209-11-2. Lower down, the Commissioner works out the shares of the partners in these profits and according to his calculations the amount to which the plaintiff Musammat Dropadi, was entitled came to Rs. 2,283-6-2. This represents a return of about 24 per cent. per annum on the capital invested by the plaintiff. All that the plaintiff complains of are what she describes as certain irregularities and certain acts of the manager of which she does not approve, and an apprehension is expressed in the plaint that loss is likely to result in the future. Furthermore, it may be pointed out that the deed of partnership in the case before us by para. 49 provides for arbitration. No argument has been addressed to us to show that this term of the agreement is in any way illegal or invalid. We have already expressed our view that it is legal. That being so, it seems to us that the plaintiff was not entitled to bring a suit for dissolution. If there were any disputes that she desired to be settled, she sought to have resorted to arbitration as laid down in the deed of agreement. This is clearly not a case in which the plaintiff needed any protection of the Court; and further it is not a case in which the appropriate protection was a decree for dissolution. In view of the circumstances of this case we have come to the conclusion that the plaintiff's suit is not a bona fide one. In our opinion the Court below exercised and there ference lismiss this appeal wit

M.

(c. s.) I. L. R. (1939 Bom. 451 ; 12 Ind. Rul. Bom. 180 ; A. I. R. (1939) Bom. 363 ; 41 Bom. L. R. 656 ; 184 I. C. 470.

Civil Reference No. 16 of 1938.

Present :—BEAUMONT, C. J. AND B. J. WADIA, J.

20th March, 1939.

COMMISSIONER OF INCOME-TAX, BOMBAY.

v.

AHMEDABAD MILLOWNERS' ASSOCIATION.

Income-Tax Act (XI of 1922) Sec. 66 (2) Sec. 3—"Association of individuals" —Association constituted—Limited Company—Assessment.

The phrase in Sec. 3 is "income, profits and gains of every individual, Hindu undivided family, Company, Firm or other association of individuals." The same words appear in various places in the Act, including Secs. 55 and 56 under which Super-Tax is charged ; although in those sections the disjunctive "or" is used before "other association of individuals" includes an association of companies. "Individual" where first used must mean human being, because it is used as something distinct from a Joint family, Firm and Company.

Civil Reference from the Commissioner of Income-tax, Bombay.

The facts appear from the Judgment.

Mr. *M. C. Setalvad, Advocate-General*—for the Income-Tax Commissioner.

Mr. *Purshottam Tricumdas*—for the Assessee.

Beaumont, C J.—This is a reference by the Commissioner of Income-tax, under Sec. 66 (2), Income Tax Act, in which he raises the question :

"Whether the Association constituted as aforementioned and having the members mentioned in para. 4 hereof has been correctly treated by the Assistant Commissioner as chargeable to income-tax, under Sec. 3 of the Act as being an 'association of individuals.'"

The association in question is the Ahmedabad Millowners' Association, and according to the finding of the learned Commissioner, it consisted, during the year of assessment, of 61 members, 60 of whom were limited companies and one was an individual person. It is clear, therefore, that if the association is to be assessed as an association of individuals, it must be on the basis that a limited company is an individual for the purposes of the charging section in the Income Tax Act. The learned Commissioner, relying on the dictionary meaning of "individual," holds that a company is an individual, since it is an indivisible entity. I am disposed to agree that if one takes merely the dictionary meaning, "individual" would include a limited company, although I think so to use the word would not be in accordance with its popular use by people speaking

English language. But whatever the dictionary or popular meaning may be, we have to deal with the word in the context in which it appears in the Income Tax Act. The phrase in Sec. 3 is "Income, profits and gains of every individual, Hindu undivided family, company, firm or other association of individuals." The same words appear in various places in the Act, including Secs. 55 and 56 under which super-tax is charged, although in those sections the disjunctive "for" is used before "other association of idivibuals" instead of the copulative "and." The question is whether "other association of individuals" incldes an association of companies. It seems to me quite clear on the context that it cannot do so. "Individual," where first used, must mean human being, because it is used as something distinct from a joint family, firm and company. The whole expression seems to me to mean 'every human being, Hindu undivided family, company, firm and other association of human beings." One cannot give to the word "Individuals" in the expression "asseciation of individuals" a different meaning to that which the word "individual" bears in the same phrase.

In my opinion, therefore, the answer to the question raised by the learned Commissioner must be in the negative. The assessee to get costs to be paid by the Commissioner on the Original Side scale.

B. J. Wadia, J.—I agree.

the debtor. In a mortgage by conditional sale, the mortgagor does not bind himself to re-pay the mortgage money. All that he does is ostensibly to sale the mortgage property on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute or on condition that on such payment being made, the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller In none of these cases, so the argument proceeds, is there any covenant by the mortgagor to re-pay the loan to the mortgagee. It is true that in certain contingencies mentioned in Sec. 68 (1) T. P. Act, the mortgagee may have a right to sue for the mortgage money even in the case of a mortgage by conditional sale. But the liability of the mortgagor in these events, it is argued, is only a contingent liability and as such, specifically excluded from the definition of debt in the Bengal Agricultural Debtors Act.

I do not think that the term "debt" can be given this narrow interpretation for the purposes of the aforesaid Act. There is no reason why we should limit the expression "liabilities of a debtor" to mean certain liabilities of a debtor and not others. Even in the case of a mortgage by conditional sale, it is quite clear that there is certain date on which the mortgage money becomes due, Under Sec. 60, T. P. Act, at any time after the principal money has "become due" the mortgagor has a right of re-lemption. This applied to all mortgages, whether by conditional sale or in any other form. It follows therefore that even in the case of mortgage by conditional sale there is a certain date on which the principal money "becomes due." The language of Sec. 67, T. P. Act, leads to the same conclusion. It seems to me that when money becomes due, it is a liability of the debtor, whatever may be the precise manner in which the liability can be enforced. In a mortgage by conditional sale the manner of enforcement is by a suit for foreclosure But this does not alter the fact that there is pre-existing liability for the mortgage money. If the framers of the Bengal Agricultural Debtors Act intended to exclude from the definition of "debt" money advanced on a mortgage by conditional sale, as distinguished from other forms of mortgage, they would have said so in unequivocal terms in one of the many exceptions that have been inserted in the definition in question. I therefore agree that the question must be answered in the affirmative, and that the Rule must be made absolute.

M.

(S C) 43 C. W. N. 1108 ; A. I. R. (1939) Cal 757 1851 : 868 ;
12 Ind. Rul. (Cal) 357.

Appeal No 19 of 1939.

Present :—DERBYSHIRE, C. J. AND NASIM ALI J.

18 h July, 1939

DIGAMBAR PONDA and another

v.

SATISH CHANDRA DAS.

B. T. Act (VIII of 1885) Sec 26-G order—Applicability of.

The B. T. Act, however, nowhere provides for an appeal against an order in a proceeding under Sec 26 G though the provisions in other sections of the Act where an appeal has been provided for against other orders

Held—That the decree of a Civil Court is not appealable under Sec 96 of the C. P. Code.

Held also – That a proceeding under Sec. 26-G is started by an application and not by a plaint, and consequently the order under Sec. 26 G cannot be said to be an order in a suit.

Appeal against the order of the District Judge of Midnapore.

The facts appear from the Judgment.

Messrs. *G. N. Das* and *S. N. Banerjee*—for the Appellants.

Messrs. *R. P. Mukherji, S K. Maity* and *K. P. Sinha*—for the Respondent.

Nasim Ali, J.—This is an appeal against an order of the District Judge of Midnapore, dated December 17, 1938, confirming the order of the Subordinate Judge, Second Court of Midnapore, dated December 3, 1938, in a proceeding under Sec. 26-G. Bengal Tenancy Act. The learned District Judge has dismissed the appeal on the ground that no appeal against the order of the Subordinate Judge lay to him. The question for determination in this appeal therefore is whether an appeal to the lower Appellate Court from the order of the Subordinate Judge was competent. Sec 26-G (6) is in these terms :

"An application under sub-Sec (5) shall be accompanied by a process-fee of the prescribed amount for service of notice on the mortgagee, and the Court or Revenue Officer to whom such an application is made, may, after service of such notice, award to the mortgagor such compensation as appears equitable in respect of the period during which the mortgagee retained possession after the date on which the mortgagor became entitled to be restored to possession and may pass an order restoring the possession of the land mortgaged to the mortgagor and such order shall have the effect of a decree of a Civil Court."

The contention of Mr. Das, on behalf of the appellants, is that the order of the Subordinate Judge is appealable, as

sub-Sec (6) of Sec. 26 G definitely states that the order shall have the effect of a decree of a Civil Court. The Bengal Tenancy Act, however, nowhere provides for an appeal against an order in a proceeding under Sec. 26-G though we find provisions in other sections of the Act where an appeal has been provided for against other orders. Mr. Das contended that the order of the Subordinate Judge being a decree of a Civil Court was appealable under Sec. 96, C. P. Code. The decree contemplated by Sec. 96 of the Code, however, is a decree made in a suit. A proceeding under Sec 26 G is started by an application and not by a plaint, and consequently the order under Sec 26-G cannot be said to be an order in a suit. The order complained against therefore was not appealable before the District Judge. The learned District Judge was therefore right in dismissing the appeal. The appeal is accordingly dismissed with costs, the hearing-fee being assessed at two gold mohurs.

Derbyshire C. J.—I agree.

M.

(s c.) 185 I. C 341 ; A I R. (1939) Cal. 718 ; 43 C. W. N 1193 ; 12 Ind. Rul. (Cal) 356.

Application

Present :—SEN, J.

18th April, 1939.

In the goods of Mst. GOLAB DAYE.

Letters of administration—Revocation—Probate to the executors—Grant—Mortgage Suit—Appointment of administrator—Defendant died—Suit pending—Will—Executors' applied for a revocation—Grant of letters of administration—Succession Act, Sec. 263.

Held—That no case has been made out for revocation for the grant of letters of administration. The Court may revoke a grant of letters of administration on the ground under Sec. 263, Succession Act.

The facts appear from the Judgment.

Mr. *N. N. Bose*—for D. N. Chatterjee and another Mortgagee.

Mr. *P. N. Mullick*—for the Administrator *ad litem*.

Mr. *S. K. Bose*—for the Executors and Executrix.

In the goods of Mst GOLAB DAYE

Order.—This is an application for the revocation of a grant of letters of administration limited for the purpose of representing the deceased in a suit and for grant of probate to the executors named in the will of one Mst. Golab Daye, deceased. The petitioners are the executors named in the will. The application is opposed by the administrator ad litem and the plaintiffs in the suit in which the administrator was appointed. Mst Golab Daye was the defendant in a mortgage suit instituted by certain persons; she died pending that suit. The plaintiffs in that suit tried to get the heirs and legal representatives of Mst. Golab Daye substituted and a long correspondence ensued between the plaintiffs and the attorney for one of the executors named Baijnath Khettri Although the executors were asked repeatedly to get themselves substituted in the suit they took no steps. Thereafter an application was made in that suit for the appointment of an administrator ad litem and citations were issued on all the executors. They did not appear and an administrator ad litem was appointed. The executors now apply for a revocation of this grant of letters of administration and also for a grant of probate to them.

The plaintiffs in the mortgage suit object to the revocation of letters of administration and they contend that if the letters are now revoked, it would lead to unnecessary delay; they suggest that this application has been brought for the purposes of delay. In my opinion no case has been made out for revocation of the grant of letters of administration. The executors had ample opportunity of getting themselves represented in the suit. They deliberately refrained from taking any steps in the matter and they cannot now complain because an administrator ad litem has been appointed. The Court may revoke a grant of letters of administration on the ground mentioned in Sec. 263, Succession Act. In my opinion, no just cause has been shown to exist within the meaning of that section. It seems to me that this application, so far as it relates to the revocation of the grant, has been made for the purpose of harassing the plaintiffs in the mortgage suit and for delay. That part of the application is, therefore, dismissed.

As regards the question whether the petitioners can get probate, it seems to me that there is no reason why they should not be given a supplementary grant of probate keeping the grant to the administrator ad litem intact. I have not been shown any provision in the Succession Act or any Indian

In the goods of Mst. GOLAB DAYE.

authority regarding this matter. Learned Counsel on behalf of the petitioners has referred me to the case in IN THE GOODS OF BROWN (1). There it was held that a supplementary grant may be made in circumstances similar to the present one. I consider that the English practice should be followed in this case. I therefore direct that a caetororum grant of probate will issue to the applicants. The grant to the administrator ad litem shall remain. The respondents (other than the administrator ad litem will get their costs as between attorney and client. So far as the administrator ad litem is concerned, he will get party and party costs. The executors will get their costs of obtaining probate out of the estate.

M.

(1) (1877) L. R. 2 P. D. 455.

(s. c.) O. W. N. (1939) 1078 ; A. I. R. (1940) P. C. 7 ; 185 I. C. 305 ; 12 Ind. Rul. (1940) P. C. 89.

PRIVY COUNCIL.

(Appeal from the Oudh Chief Court).

Present :—LORD MACMILLAN, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

10th October, 1939.

Babu BHAGWAN DIN and others

v.

GIR HAR SAROOP and others.

Charitable and Religious Trusts Act (XIV of 1920) Sec. 3—Application—Trust—Public temple—Religious purpose—Grant—Claim—Res-judicata—Trust property—Heirs—Endowment—Idol.

Held—That the grant (1781) has not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The reference to the grantees heirs, and the Arabic terminology *Naslan ba' da naslin wa batnan ba' da batnin* (descendant after descendant and generation after generation) were not reconcileable with the view that the grantor was in effect making a Waqf for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis.

BHAGWAN DIN v. GIR HAR SAROOP.

Held again—That the Hindu temple is a public temple and that the property is impressed with a trust of a public religious character.

The facts appear from the Judgment.

Mr. *P. V. Subba Rau*—for the Appellants.

Mr. *Y. B. W. Ramsay*—for the Respondents.

Sir George Rankin—On April 14, 1930, the first two appellants (uncle and nephew) filed before the District Judge at Lucknow an application under Sec. 3 of the Charitable and Religious Trusts Act (XIV of 1920) for an order directing accounts to be furnished in respect of a certain temple in Lucknow together with land and houses adjacent thereto and occupied therewith The principal deity is Bhaironji and from this idol the temple takes its name but there are other idols also in different parts of the temple compound, which is now of an area variously stated as about four bighas or 16 biswas. The respondents to the application were five in number, three men and two women : with certain other members of their family, they are now respondents before the Board in this consolidated appeal. They claim to be direct descendants of one Daryao Gir to whom a grant was made in 1781 of the land now in question by the then reigning Nawab of Oudh. It has been found and it does not appear to be in doubt that the members of this family are gribastha fakirs being at once goshains and householders. The family comes from the Bijnore District "on the Dhampur side" and is a joint Hindu family of the usual type. At the time of the application to the District Judge members of the family had been continuously in occupation and control of the temple and a number of samadhs or tombs had been set up containing the ashes of goshains who had belonged to the family. No interference with the management of the temple or the conduct of its worship whether on behalf of the public or otherwise had at any time taken place. It was not alleged in the application that the family had been guilty of any neglect or mis-management and the contrary has now been held by the Courts in India. The District Judge gave to the five respondents before him an option to bring a suit for a declaration that the property was not subject to a trust for a public purpose of a charitable or religious nature but they did not take this course. Accordingly he threw upon them the burden of disproving this alegation and after hearing nine witnesses for the applicants and two

of the respondent goshains, and after considering certain documents, he held that there was a strong prima facie case that the temple formed the subject of a public trust and that the goshains had failed to establish the opposite. He therefore directed the goshains before him to furnish particulars of the extent of the property, the nature of the buildings and the income for the past year (October 1, 1930). This order was not complied with, and on September 16, 1931, the first two appellants brought in the Court of the Subordinate Judge, Mohanlalganj. Suit No 108-7 of 1931 against the same five members of the respondent's family. The suit was framed under Sec. 92, C. P. Code; relying upon the failure to furnish particulars as ordered by the District Judge, the plaint asked for removal of the defendants, the appointment of new trustees and the framing of a scheme for the management of the temple. Before judgment had been given in this suit, another suit—No 8-130 of 1931—was on December 23, 1931, brought in the same Court by 14 plaintiffs claiming that they and four of the persons impleaded as defendants were members of the joint Hindu family to whom the temple belonged. This meant that 13 persons who had not been made parties to the proceedings before the District Judge were now putting their rights in suit as descendants of Daryao Gir and his co-parceners. The contesting defendants to this suit included the first two appellants that is the uncle and nephew who had initiated the proceedings before the District Judge. Judgment in the former of these Suits (No. 108-7) was given on February 22, 1932, by the learned Subordinate Judge at Mohanlalganj. He held that the five goshains, defendants before him, had not proved that 13 other members of their family were interested and he left this to be determined in the other suit. He considered that the order of the District Judge concluded the question whether the temple was or was not the subject of a public religious trust and he decreed the suit, removing the five defendants, appointing new trustees and approving a scheme. About a year later (February 28, 1933), judgment in Suit No 8, 130 of 1931 was delivered by another Subordinate Judge (at Malihabad) holding that the temple property was the private and personal property of the 18 persons (14 plaintiffs and four defendants) of the respondents' family on behalf of whom it had been claimed. Both of these decisions were taken on appeal to the Chief Court at Lucknow and on October 23, 1934, Nanuvutty and Ziaul

Hasan, JJ. delivered one judgment covering the two appeals. They held that the temple property was not impressed with a public trust but was private property belonging to the joint family of the goshains. Hence the two appeals, which are now before the Board as a consolidated appeal.

The first question is whether the order of the District Judge made under the Charitable and Religious Trusts Act 1920, precludes the respondents from disputing that the temple is the subject of a public religious trust. That order was made in the presence of five members only of the family and it is not shown that the other members are bound by it according to any principle of representation. Hence it is difficult to see how these other members can be prevented from claiming the property as belonging to their joint family. The Chief Court have refused for other reasons also to regard the District Judge's order as conclusive. In this they have followed, the decisions of a Bench of the Lahore High Court in PREM NATH v. HAR RAM (1) and a Single Judge of the Bombay High Court in HAIDARALI v. GULAMMOHIUDDIN (2) and have agreed with the view of Niamutulla, J. in MAHADEO BHARTHI v. MAHADEO RAI (3) in preference to the opinion of Mukerji, J. in the case last-mentioned. Their Lordships agree with the Chief Court. They hold that the decision of the District Judge under the Act of 1920—a decision from which by Sec. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; that it has not been made final by any provision in the Act; and that the doctrine of res-judicata does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The existence of a public trust is the foundation of the proceedings authorised by Sec. 3 of the Act : prima facie while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot, by an erroneous decision thereon, given himself jurisdiction. To produce this result there must be some provision in the Act which requires a contrary construction. No matter

(1) 16 L. 85 ; 7 R. L. 531 ; 36 P. L. R. 13 ; 154 I. C. 229 ; A. I. R. 1934 Lah. 771.

(2) 7 R. B. 180 ; A. I. R. 1934 Bom. 343 ; 36 Bom. L. R. 687 ; 152 I. C. 781 ; 58 B. 623.

(3) Ind. Rul. (1929) All. 865 ; (1929) A. L. J. 653 ; A. I. R. 1929 Lah. 506 ; 118 I. C. 513 ; 51 A. 805.

how long or how peaceably an individual may have been in possession and enjoyment of property, it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It is readily intelligible that the District Judge should be required to stay proceedings under the Act in any case in which the person against whom they have been taken is willing to bring a suit. But it would be both drastic and anomalous to provide that a person in possession, is not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. The terms of Sec. 6 of the Act are intended, in their Lordships' view, to define the consequences of such an order as was made in this case by the District Judge on October 1, 1930, but the words "if a trustee without reasonable excuse fails to comply" cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under Sec 92 of the Code.

Upon the merits, it is desirable to consider first the documents. The main document of title has already been mentioned. It is exhibit No. 4 dated April 2, 1781, whereby the Nawab of Oudh granted the property now in question to the respondents' ancestor, Daryao Gir. The grant runs as follows :—

" The present and future state officials of Haveli Lucknow, suburbs and the province of Akhtarnagar, Oudh, should know that five *pucca bighas* waste land, free from Government revenue, *mal* and *sewai*, in the immediate vicinity of village Nawagaon, included in the said Haveli whereon lies the house of Bhairon, has been granted along with the said house, in the name of Daryao Gir *goshain*, the *mahant*, free of all dues and shall not be shown in the record : that the said land shall, generation after generation and descent after descent, be left in the possession and enjoyment of the said person and his heirs and they (officials) should not interfere and meddle with the same for any reason so that the said person having remained in possession of the said land and constructed a house, etc., should with contentment and devotion remain engaged in praying for His Highness."

This grant was construed by a Court of the Nawab in 1843 when members of the respondents family took proceedings to eject certain dhobis (washerman) who had been allowed to set up and live in a thatched hut in the courtyard of the temple. It was held to be a grant of five bighas of the waste land to

Daryao Gir, ancestor of the fakirs, to be held generation after generation as a muafi (revenue free grant) and that the fakirs had been long in possession. There is also the Khasra compiled after 1857 at the time of the First Settlement of the city of Lucknow soon after the annexation of Oudh by the British. This shows the plot as "mud house of Bhairongi" and under the heading "name of owner by virtue of possession" are inserted "Kesri Gir and Jawahir Gir and Kalyan Gir disciples of Daryao Gir". These are the main documents in the case but there are in addition a number of sarkhats, or leases of shop rooms on the outskirts of the temple property. These are expressed to be granted by individual members of the respondents' family: as the trial Judge (in Suit No. 8-130) has pointed out, the lessors were representative of each of three branches of the family. The Chief Court noticed that there is no lease in the name of the idol as distant from the names of individual goshains. In these leases the goshains are sometimes referred to as "owners" of the shop or kothri: in one at least, as owners of the asthan Sri Bhaironji.

It will be convenient to indicate the main features of the evidence before attempting to draw any inferences form the documents. The appellants rely strongly on the fact that for many years Hindu members of the public have resorted to the temple for worship and darshan without let or hindrance. About 46 years before the trial, a mela or fair had been started by some musicians and dancers and had become an annual function towards which public subscriptions were collected There was some evidence that part of these monies had been spent upon whitewashing and repairing the temple but the Chief Court does not consider this to be established; though it is certain that the temple and its goshains profited from the increased resort to the temple during the mela.

The appellants maintain that upon a review of the history of the temple, they have established that it was held out to the public as a public temple and that the Courts in India should have applied to it the reasoning of the Board in the Madras case of PUJARI LAKSHMANA GOUNDAN v. SUBRAMANIA AIYAR (1). The facts which have been held by the Courts below to tell in

(1) 10 O & A L. R. 606; (1924) M. W. N. 278; 22 A. L. J. 169; 19 L. W. 253; A. I. R. (1924) P. C. 44; 81 I. C. 518; 28 C. W. N. 112.

favour of the respondents are that there had been no previous interference with the temple on behalf of the public; that the goshains took the offerings for themselves; that they divided them according to their shares as members of different branches of the family; that they spent money on repairs; that they gave leases in their individual names and not in the name of the idol: that they closed the temple when they had occasion to go to their native village for family ceremonies, e.g., marriages, and that tombs to certain members of the family were put up though they could not claim to be famous saints.

Their Lordships agree with the Chief Court in holding that the grant of 1781 is not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant is to Daryao Gir and his heirs in perpetuity. Had it been intended as an endowment for an idol it would have been very differently expressed: the reference to the grantee's heirs and the Arabic terminology naslan ba'da naslin wa batnan ba'da batnin (descendant after descendant and generation after generation) are not reconcileable with the view that the grantor was in effect making a waqf for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis. While it is true that the origin of the idol is not completely traced—the respondents' allegation that it was founded or set up by Kishore Gir, father of the grantee, not being established by evidence—the grant of 1781 discloses the existence of a fakir with an idol in a mud hut squatting upon waste land which did not belong to him and which was given to him for the first time by the grant. It would, in their Lordships' opinion be an error in method if the subsequent history of the little temple was not looked at in the light of this grant. While it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Their Lordships consider that in Suit No. 8-130, the Courts in India have followed a proper method and arrived at a correct conclusion upon the point. The decision of 1843 shows the position to have then been as in 1781 and the khasra at the time of the Settlement of Lucknow shows no variation—there is still a mud hut with an idol in it and the "owners" are members of the respondents' family, though described as "disciples of

Daryao Gir." The general effect of the evidence is that the family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage of other ceremonies required the attendance of the members of the family at its original home, and erecting samadhs to the honour of its dead. In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned awry on pain of forfeiture of the temple property as having become property belonging to a Public Trust Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present: and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inferrence if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentimants or practice that worshippers should be turned away; and as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity Thus in MUNDANCHERI KOMAN v. ACHUTHAN NAIR (1) the Board expressed itself as being slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple, PUJARI LAKSHMANA GOUNDAN v. SUBRAMANIA AYYAR (SUPRA) (2) in which it was held

(1) 39 C. W. N. 518 (P. C.); (1934) O. L. R. 764; (1934) A. L. R. 898; 58 M. 91; 60 C. L. J. 344; 67 M. L. J. 788; (1934) M. W. N. 1055; 40 L. W. 428; 11 O. W. N. 1150; A. I. R. (1934) P. C. 230; 7 R. P. C. 55; 151 I. C. 329; 61 I. A. 405.

(2) 10 O. & A. L. R. 606; (1924) M. W. N. 278; 22 A. L. J. 169; 19 L. W. 253; A. I. R. (1924) P. C. 44; 81 I. C. 518; 29 C. W. N. 112.

BHAGWAN DIN v. GIR HAR SAROOP.

that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple. The Chief Court have, in the opinion of the Board, correctly estimated the particular facts of the case before them and have rightly negatived the contentions that the temple is a public temple and that the property in suit is impressed with a trust of a public religious character.

Their Lordships will humbly advise His Majesty that this consolidated appeal should be dismissed. The appellants must pay the respondents' costs.

Messrs. *Hy. S. L. Polak & Co.*—Solicitors for the Appellants.

Messrs. *James Gray & Co.*—Solicitors for the Respondents.

M.

(S. C.) I. L. R. 1 Cal. (1939) 201 ; A. I. R. (1939) Cal. 514 ; 43 C. W. N. 815 ; 184 I. C. 835 ; 12 Ind. Rul. (Cal.) 316.

Suit No. 886 of 1938.

Present :—SEN, J.

August 12, 1938.

RATAN BEHARI DUTTA.

v.

MARGARETHA HEH.

Special Marriage—Special Marriage Act (Act III of 1872) Sec. 2—Declaration of marriage—Person professed the Hindu religion—Declaration made by the parties before the Registrar—Marriage is null and void.

That two classes of persons only may be married under the Act, *viz.*, (1) persons who do not profess any of the religious mentioned in the first part of Sec. 2 and (2) persons each of whom professes one or other of the four religions mentioned in the second part of the section.

Held—That there can not, therefore, be a marriage celebrated under this Act between a person who professes the Hindu religion and a person who does not profess any one or other of the following four religions, viz., the Hindu, Buddhist, Sikh or Jain religion.

The facts appear from the Judgment.

Mr. *Sekhar Bose*—for the Plaintiff.

RATAN BEHARI DUTTA *v.* MARGARETHA HEH.

Judgment.—This is a suit by one Ratan Behari Dutt for declaration that the marriage solemnized between him and one Margaretha Heh is null and void. The parties went through a form of marriage under the Special Marriage Act, Act III of 1872. According to that Act, the parties have to make certain declarations in accordance with the terms of Sec 2 of the Act, before the Registrar of Marriages appointed under Act III of 1872. The declarations made by the parties have been proved. Ratan Behari Dutt declared that he professed the Hindu religion, while Margaretha Heh declared that she did not not profess the Christian, Jewish, Hindu Muhammadan Parsi, Buddhist, Sikh or Jain religion. In short, she did not profess to follow any religion at all. They made other declarations which are not material for the purposes of this suit. The plaintiff says that this marriage is null and void inasmuch as it offends against the provisions Sec. of 2, Special Marriage Act.

In my opinion, the contention on behalf of the plaintiff must be given effect to. Sec. 2, Special Marriage Act, consists of two portions. Under the first portion, persons who do not profess the Christian or Jewish or Hindu or Muhammadan or Parsi or Buddhist or Sikh or Jain religion are permitted to be married under the Act. The present case does not come under this part of the section inasmuch as Ratan Behari Dutt has declared that he professes the Hindu religion. The next part of the section permits the marriage of persons, each of whom professes one or other of the following religions, namely, the Hindu Buddhist, Sikh or Jain religon. It is clear from the section therefore that two classes of persons only may be married under this Act, viz, (1) persons who do not profess any of the religions mentioned in the first part of Sec. 2, and (2) persons each of whom professes one or other of the four religions mentioned in the second part of the section. There cannot, therefore, be a marriage celebrated under this Act between a person who professes the Hindu religion and a person who does not profess any one or other of the following four religions, viz, the Hindu, Buddhist, Sikh or Jain religion. In the present case, the plaintiff professed the Hindu religion while the defendants professed none of the last-mentioned four religions. That being so, the marriage is null and void.

The case is an undefended one, but I consider that it is necessary to pronounce a judgment at some length in view of the importance of the question involved. There can be no

RATAN BEHARI DUTTA v. MARGARETHA HEH.

doubt that the Marriage Registrar did not understand the true import of Sec 2, Special Marriage Act, with the result that he allowed two persons to go through a form of marriage which marriage is now found to be null and void. I need hardly say that it is of the utmost importance that cases of this kind should not recur and I trust that Marriage Registrars will be duly instructed in such a way as to prevent their performing invalid marriages of his description. Learned Counsel appearing on behalf of the plaintiff very properly drew my attention to the case in OTTO GUENTER WENKENBACH v. HENRIETTA VIOLET TAYLOR, (1), wherein a contention was raised that in the circumstances of that case the suit should have been brought in this Court in its Matrimonial Jurisdiction and not in its Ordinary Original Civil Jurisdiction. That case, however, is clearly distinguishable from the present one and in my opinion the present case has rightly been brought in this Court in its Ordinary Original Civil Jurisdiction. The marriage of the plaintiff is declared null and void. The suit is decreed. There will be no order for costs.

M.

(1) 41 C. W. N, 270.

(S. C) 43 C. W. N. 1061 ; 12 Ind. Rul. (Cal.) 318 ; 184 I. C. 848 ; A. I. R. (1939) Cal. 703.

Criminal Revision No. 606 of 1939.

Present :—HENDERSON AND KHUNDKAR, JJ.

July 10, 1939.

NIHARENDU DUTT MAJUMDAR and others.

v.

EMPEROR.

I. P. Code (Act XLV of 1860), Sec. 188—Order under Sec. 144 of Cr. P. Code—Conviction—Question of jurisdiction—Conviction whether legal.

Held—That it is necessary to distinguish carefully between the jurisdiction of the Magistrate to make an order and a possible practical difficulty in showing that it has been disobeyed.

NIHARENDU DUTT MAJUMDAR *v.* EMPEROR.

Held also—That it does not follow that because it is difficult for the Crown to secure a conviction, that the order itself was made without jurisdiction.

The facts appear from the Judgment.

Mr. *N. K. Basu* and *A. K. Roy*—for the Petitioners.

Mr. *D. N Bhattacharjee*, Deputy Legal Remembrancer—for the Crown.

Henderson, J.—The petitioners have been convicted of an offence punishable under Sec. 188, Penal Code, for disobeying an order made by the Sub-Divisional Magistrate of Barrackpore under Sec. 144, Cr. P. Code. The facts which give rise to the prosecution are briefly as follows: It is said that communal tension had been aroused in the locality in connection with a strike. After setting out the matters which gave him jurisdiction, the Sub-Divisional Magistrate passed an order under Sec. 144. Altogether that order contained three directions and the petitioners are alleged to have disobeyed the third which was in these terms:

"That no public meeting shall be held in any area in the sub-division so long as this order is in force except on special permission from me which must be applied for at least 24 hours before the said meetings are held."

On December 9 last, the officer-in-charge of the thana at Titagarh was informed that petitioner No. 1 and others had come to Titagarh and were holding a meeting in front of a certain dispensary. He went to the spot with some Police and found petitioner No. 1 addressing a crowd He ordered the crowd to disperse as in his opinion they were violating the order made by the Magistrate. The contention of the prosecution is that in taking this action the petitioners were guilty of an offence punishable under Sec. 188, Penal Code. They were convicted by the Magistrate of Barrackpore. As their appeal to the Sessions Judge was dismissed, they obtained this Rule. The Rule was pressed on two grounds: (1) The order itself is illegal; (2) That there is no evidence to show that the petitioners had any knowledge of it. The first ground is based upon cl. (3) of Sec. 144, Cr. P. Code, which is in these terms:

"An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place."

This particular order was addressed to the public when visiting any part of the Barrackpore sub-division. In support of this ground, Mr. Basu contended that the scope of the order

was far too wide and drew a distinction between a particular place and an area. In support of his contention, he relied upon the cases in IN RE D. V. BELVI (1) and EMPEROR v. MOTILAL GANGADHAR (2) On the other hand, the learned Deputy Legal Remembrancer relied upon the case in VASANT B. KHALE v. EMPEROR (3). In my opinion, it is necessary to distinguish carefully between the jurisdiction of the Magistrate to make an order and a possible practical difficulty in showing that it has been disobeyed. It does not follow that because it is difficult for the Crown to secure a conviction, that the order itself was made without jurisdiction. If we apply the test laid down by the learned Judges in those two Bombay cases, it would be very difficult to say where a place ends and an area begins. It is obvious that a line would have to be drawn somewhere and for my part I shall find it very difficult to draw such a line. Nor is the matter of much practical importance: for example, if an area may be said to contain 150 places, the Magistrate could pass 150 orders in identical terms and the result would be exactly the same. In our opinion, the order is a definite order and it does not contravene the provisions of Sec. 144.

On the second point, the learned Deputy Legal Remembrancer conceded that he had no evidence apart from the evidence relating to what took place at the actual meeting. It is said that the petitioners knew of the order because they were told of it by the Sub-Inspector while the meeting was actually going on. The evidence on the point is extremely scanty and is to be found in the deposition of P. W. No. 1, P. W. No. 3 and P. W. No. 4, P. W. No. 1, the Sub-Inspector, says that he ordered the crowd to disperse as they had assembled in violation of the order. The order was given in an audible voice and part of the crowd actually dispersed. It is, of course, difficult for him to say whether the order was audible to other persons or not. P. W. No. 3, the Town Inspector, corroborates this account of the action taken by the officer-in-charge of the thana and adds that petitioner No. 1 and five other persons were

(1) 38 Cr. L. J. 1144 ; Ind. Rul. (1931) Bom. 456 ; (1931) Cr. C. 581 ; A. I. R. 1931 Bom. 385 ; 134 I. C. 344 ; 33 Bom. L. R. 673.
(2) 33 Cr. L. J. 75 ; Ind. Rul. (1931) Bom. 81 ; (1931) Cr. C. 945 ; A. I. R. 1931 Bom. 513 ; 134 I. C. 1237 ; 33 Bom. L. R. 1178.
(3) 7 R. B. 161 ; 36 Cr. L. J. 135 ; 36 Bom. L. R. 733 ; (1934) Cr. C. 1212 ; A. I. R. 1934 Bom. 375 ; 152 I. C. 701 ; 59 B. 27.

addressing the meeting at the time. P. W. No. 4 merely says that the Police arrived and began to move people telling them that there was a Sec. 144 order. It appears therefore that his version is not quite the same. From this evidence it is abundantly clear that no personal communication was made to any of the petitioners. There is no distinct evidence as to the relative positions of the petitioners and the thana officer in the crowd. The learned Judge did not consider whether it necessarily follows that petitioner No. 1 heard what was said by the Sub-Inspector at a time when he himself was actually delivering a speech. The prosecution really did not take sufficient trouble to see that the evidence on this very essential point was sufficient and clear.

Then in the second place the order itself is not very happily worded. It does not clearly forbid attendance at a meeting or making speeches at a meeting. The use of the words 'no public meeting shall be held' seems to suggest something in connection with the organization of a meeting. From the evidence it appears that the petitioner, Majumdar did nothing more than behave like a Hyde Park orator. The actual order is capable of more interpretation than one. Before it can be said that the petitioners had knowledge of the order, it must be shown that its terms were communicated to them. Instead of doing that, the Sub-Inspector merely gave his own interpretation of it, which is quite a different thing. We must accordingly accept the contention raised in the second ground that there is no evidence upon which it can be held that the petitioners had any knowledge of the order. The Rule is accordingly made absolute, the convictions and sentences are set aside and the petitioners are discharged from their bail.

Khundkar, J.—I agree.

M.

(S C) 44 C. W. N 74 ; (1940) A. I. R. (Cal.) 1.

Appeal No. 211 of 1938.

Present :—B K MUKHERJEE AND ROXBURGH, JJ.

18th August, 1939.

Sm BHUBAN MOHINI DEBI and another

v.

BIRAJ MOHAN GHOSH.

C P. Code (1908) Sec 80—Mortgage Sale—Duty of a Receiver—Sec. 2 (17) —Suit for declaration of title—Recovery of khas possession—Collusion—Allegations—Debuttar estate—Establishment of title.

Held that—It cannot be disputed that it is the duty of a receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of justice whose duty it is to take charge or dispose of any property within the meaning of Sec 2 (17) (d), C P Code (1908). Even if he is not an "officer" he is clearly a person especially authorized by a Court of justice to perform such duties, as laid down in that clause.

Held again—That it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official capacity, it is essential before a suit is commenced that there should be a notice served upon him under Sec. 80 C. P. Code.

Appeal against the decree of the Addl. District Judge of 24-Parganas.

The facts appear from the Judgment.

Dr. *S. C. Bysack*, *S. N. Mukherjee* and *S. N. Mukherjee*—for the Appellants.

Rabi Roy and *N K. Dutt*—for the Respondent.

Judgment.—This appeal is on behalf of the plaintiffs and the suit was one commenced by them for establishment of their title to the lands in suit and for recovery of khas possession on evicting defendant 1 There was a claim for mesne profits against both the defendants and an alternative claim for rent in case defendant 1 succeeded in establishing his tenancy right to the disputed land. The plaintiffs' case was that the lands in suit appertained to the secular estate of one Rajmohan Nag Choudhury which vested in the predecessor of the plaintiffs under a sale in execution of a mortgage decree. Defendant 1 was a tenant in occupation of the said lands, but in a rent suit which was instituted against him by the plaintiffs he denied their title and set up a tenancy right under the debuttar estate of Rajmohan Nag Choudhury which admittedly did not pass to

the plaintiffs' predecessor by the mortgage sale and which is now in possession of defendant 2 as a receiver appointed by the Court.

This plea was given effect by the Court which decided the rent suit and the plaintiff's claim for rent was dismissed. The plaintiffs have now commenced this suit for recovery of khas possession of the lands on the footing that defendant 1 is a trespasser. It was alleged that certain rent receipts were produced by defendant 1 in the rent suit in collusion with defendant 2 for the purpose of proving the title of the debutter estate, and in fact the latter was all along asserting its right to realize rents from defendant 1. On these allegations the plaintiffs wanted mesne profits against both the defendants and in case it was found that defendant 1 was a tenant, and had paid rents to the debutter estate, there was an alternative prayer for recovery of the sums realized as rents from defendant 2. Both the defendants contested the suit. Their contention in substance was that the lands in suit appertained to the debutter estate and the plaintiffs had no right or title to the same. It was said that the decision in the rent suit was quite correct, and that defendant 1 had as a matter of fact paid rents to the debutter estate up to 1340 B. S. Defendant 2 raised a further point that the suit was not maintainable against him without a notice under Sec 80, C. P. Code. The trial Court on a consideration of the evidence in the record came to the conclusion that the plaintiff had no title to the lands in suit, which were in reality a part of the debutter estate of Rajmohan Nag Choudhury. On this finding, the suit was dismissed, and the Munsif did not go into the other questions raised in the issues, including the question of notice under Sec. 80, C. P. Code. There was an appeal taken by the plaintiffs, against this decision, and the Additional District Judge of Alipur who heard the appeal reversed the finding of the Munsif on the question of title and came to the conclusion that the property in suit was included in the secular estate of Rajmohan and hence passed by the mortgage sale to the plaintiffs' predecessor. As the trial Court had not decided the issue raised on the question of notice under Sec. 80, C. P. Code., the case was sent back to the trial Judge for re-hearing on the point. The Munsif, after remand decided this issue against the plaintiffs and held that the suit was not maintainable against defendant 2 as no notice was served upon him under Sec. 80, C. P. Code. This view was

affirmed in appeal by the Additional District Judge, 24-Parganas. The result was that the suit was dismissed against defendant 2. It was disposed of as against defendant 1 on the terms of a compromise entered into between him and the plaintiffs. It is against the order of dismissal against defendant 2 that the plaintiffs have come up on second appeal to this Court.

Dr. Bysack appearing in support of the appeal has contended in the first place that a receiver is not a public officer and consequently no notice under Sec. 80, C. P. Code, is necessary. This contention is opposed to a number of authorities of this Court where it has been held that a receiver is a public officer and is entitled to a notice under Sec 80, C. P. Code. It cannot be disputed that it is the duty of a receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of justice whose duty it is to take charge or dispose of any property within the meaning of Sec. 2 (17) (d), C. P. Code. Even if he is not an "officer" he is clearly a person especially authorized by a Court of justice to perform such duties, as laid down in that clause. The case in JAGADISH CHANDRA DEO v. DEBENDRA PRASAD BAHADUR (1), is a direct authority on the point, that a receiver is a public officer. The learned Judges who decided this case observed in their judgment that there were several earlier decisions in which the same view was taken. It is true, as has been pointed out by Dr. Bysack, that most of the earlier cases were really cases of a common manager and not of a receiver appointed under the provision of the C. P. Code: vide BENI MADHAB v. DEB NARAYAN (2) and NABA KISHORE MANDAL v. ATUL CHANDRA CHATTERJEE (3). In fact the earliest reported authority on the question of a receiver being a public officer is to be found in RADHARANI DASYA v. PURNA CHANDRA SARKAR (4). This was an application for leave to appeal to His Majesty in Council against a judgment of Page and Patterson JJ. passed in S. A. No. 1481 of 1929 RADHARANI DASYA v. PURNA CHANDRA SARKAR (5). The

(1) 35 C. W. N. 161; 58 Cal. 850; 132 I. C. 634; (1931) 18 A. I. R. Cal. 503.
(2) 31 C. L. J. 279; 24 C. W. N. 138; 53 I. C. 747; (1920) 7 A. I. R. Cal. 575.
(3) 17 C. W. N. 846; 16 I. C. 193; (1913) 40 Cal. 150.
(4) 34 C. W. N. 671; 128 I. C. 103; (1930) 17 A. I. R. Cal. 737.
(5) 129 I. C. 319; (1930) 17 A. I. R. Cal. 721.

suit out of which the appeal arose was one instituted against an ex-receiver for recovery of money alleged to have been misappropriated by the latter. The Court below dismissed the suit on the ground of an absence of notice under Sec. 80, C. P. Code, and this Court affirmed that decision.

In support of the application for leave to appeal to His Majesty in Council a point was raised that even though a notice might be necessary when the receiver was still in office, there could be no such necessity after he was discharged. It was held by Rankin C. J. sitting with C. C. Ghosh J. that that was not a reasonable construction to be put upon Sec. 80 read with Sec. 2 (17), C. P. Code; and this being not a substantial question of law, leave to appeal to His Majesty in Council was refused. It may be pointed out that in this case Page and Patterson JJ. relied on the earlier cases relating to a common manager as authorities in support of the proposition that a receiver was a public officer, and this view has not been dissented from since then. The question as to whether a common manager was a public officer was raised in RAYATI MOHAN DAS v. JATINDRA MOHAN (1), but their Lordships of the Judicial Committee left the question undecided, and disposed of the case on the other ground that the suit was not one in respect of any act or omission on the part of the common manager, assuming that he was a public officer within the meaning of Sec. 80, C. P. Code. Dr. Bysack has laid much stress on certain observations made by Costello J. in PURNA CHANDRA v. RADHARANI DASYA (2). The learned Judge indeed observed in his judgment in this case, that he was startled to hear it argued that receivers must be treated as public officers within the meaning of Sec. 80, C. P. Code. But even then there was no decision on this point, and the learned Judges based their judgment on the ground that as no objection on the score of want of notice was raised by the defendant in proper time he could not raise it afterwards. It may be that the question still awaits final determination by the Judicial Committee, but in view of the authorities mentioned above and the provision of Sec. 2 (17) (d), C P. Code, we do not think that we would be justified in holding that a receiver is not a public officer.

(1) 61 Cal. 470 (P. C.; 61 I. A 171; 148 I. C. 482; (1934) 21 A. I. R. (P.C.) 96.

(2) 53 C L. J. 31; 130 I. C. 894; (1931) 18 A. I R. Cal. 175.

BHUBAN MOHINI v. BIRAJ MOHAN.

The next question for our determination is, whether assuming that a receiver is a public officer, a notice under Sec 80, C. P. Code, was necessary in the circumstances of the present case. Dr. Bysack argues that a notice may have been necessary with regard to the claims for mesne profits or compensation made by the plaintiff in their plaint, but so far as declaration of title to the disputed property is concerned, the plaintiffs' cause of action is not based on anything done or omitted to be done by the receiver. The receiver was made a party simply because defendant 1 set up the title of the debutter estate, and it was proper that the question should be decided in the presence of the receiver. Under these circumstances the contention of the learned advocate is that the Courts below should have given his clients a declaration of title to the land in suit against defendant 2 though the claim for mesne profits might be dismissed. In fact his clients made an application before the Court of Appeal below withdrawing their claims for compensation and mesne profits against the receiver.

It is quite true that if two or more causes of action are united in one suit, and with regard to one of them the suit fails for want of notice under Sec. 80, C. P. Code, there is no reason why the entire suit should be dismissed : vide DAKSHINA RANJAN GHOSH v. OMAR CHAND (1) But this contention by itself is of no assistance to Dr. Bysack's clients. If the suit is really a suit against the receiver within the meaning of Sec. 80, C. P. Code, the cause of action of the plaintiffs even as regards declaration of title, is clearly based on certain specific acts alleged to have been committed by the receiver. In para 9 of the plaint there are definite allegations against him of collusion with defendant 1 in granting rent receipts, and setting up a claim to possession in the disputed property. The receiver moreover did not take up a neutral attitude, and the defence of both the defendants in answer to the plaintiffs' claim is identically the same Such being the case it is not possible in our opinion to sever one part of the case from the other. This contention of Dr. Bysack therefore must fail. But we think that quite apart from these contentions the appellants are entitled to succeed on another and a broader ground, viz., that the present suit is really not one against the receiver as a public officer as is contemplated by

(1) 28 C. W. N. 10 ; 38 C. L. J. 164 ; 50 Cal 992 ; (1924) 11 A. I. R. Cal. 145 ; 75 I. C. 173.

Sec 80, C. P. Code. As was observed by the Judicial Committee in BHAGCHAND DAGADUS v. SECY. OF STATE (1), Sec. 80 was intended "to afford protection to officials against personal responsibility for official acts." If it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official capacity, it is essential before a suit is commenced that there should be a notice served upon him under Sec 80, C. P. Code. The object of the notice is to give him an opportunity to reconsider his position with regard to the claim and to make amends, or settle the claim if he is so advised.

The suit in the present case is not against the receiver as such; it is really a suit against the debutter estate. The plaintiffs' cause of action is that the debutter estate, which is now in the hands of the receiver under orders of the Court, has dispossessed them from the land in suit, through defendant 1 who is a tenant of theirs. The plaintiffs want to have their title to the disputed property established against the debutter estate, and it is from the debutter estate that they want to recover mesne profits. In short the plaintiffs do not pray for anything against the receiver personally. They want a decision which would be binding on the debutter estate. If the receiver is discharged today, the suit would then proceed against the debutter estate and those who own it. It is well settled that no estate vests in the receiver by virtue of his appointment. He collects rents or profits, income or capital on the title of the persons who are parties to the suit, and he defends the suit because of the powers given to him by the Court under Or. 40, R. 1 (d), C P. Code. I think that in such cases when no relief is claimed against the receiver personally, and the suit is really against the estate, which does not vest in the receiver, but which is held by him under orders of the Court who made the appointment, the suit cannot be said to be one against the receiver within the meaning of Sec. 80, C. P. Code. In other words, Sec. 80, C. P. Code, contemplates in my opinion a suit against the receiver which seeks to make him personally liable for acts, done or purporting to be done by him in his official capacity, and it does not contemplate a case where a suit for possession is brought against the owners of the estate in the

(1) 51 Bom 725 (P. C.); 54 I. A. 338; 104 I. C. 257; (1927) 14 A. I. R. (P. C.) 176.

respect of which he has been appointed a receiver, and which suit he has got to defend under powers conferred on him by the Court. In such cases it is undoubtedly necessary to take the leave of the Court which appointed the receiver, before the latter can be made a party to the proceedings, and that is on the principle that interference with the possession of the receiver, without leave would amount to a contempt of the Court, whose officer the receiver is. But there is in my opinion no necessity to serve upon him a notice under Sec. 80, and there can be no meaning in sending such notice. It would not be in the powers of the receiver to make amends of his own accord. If any reparation is to be done that can only be done by the persons who actually own the estate. If the receiver proceeds to satisfy the claims of the plaintiffs on his own responsibility he may himself be made liable at the instance of the persons who have got the title.

It is to be noticed that all the authorities mentioned above, with the exception of the one in REVATI MOHAN DAS v. JATINDRA MOHAN (1), which was decided by the Judicial Committee, are cases where the receiver was sought to be made personally liable for acts purporting to be done by him as a public officer, and hence, it could properly be said that notice under Sec. 80, C. P. Code, was necessary in these cases. In REVATI MOHAN DAS v. JATINDRA MOHAN (1), the suit was one to enforce a charge upon properties in the hands of a common manager and not to make him personally liable. As the suit was not in respect of any act of omission on the part of the common manager it was held by the Judicial Committee that no notice was necessary. There is an important passage in the judgment of their Lordships which in our opinion clearly indicates that a suit which was not against the common manager personally would not in their Lordships' opinion come under Sec. 80, C. P. Code. "The appellant made no claim against respondent 1 personally" so runs the judgment :

> He was there only as representing the estate of which the sale was sought. In their Lordships' opinion such a suit is not within the ambit of Sec. 80, and no notice of suit was required.

There is no authority that I am aware of which holds that notice under Sec. 80 is necessary where the relief is sought

(1) 61 Cal. 470 (P. C.) ; 61 I. A. 171 ; 148 I. C. 482 ; (1934) 21 A. I. R. (P.C.) 96.

against the estate itself, in the hands of the receiver or the common manager. It may be mentioned here that no notice under Sec. 80 is necessary in suits against the Official Trustee or the Administrator-General except when these officers are sought to be made personally liable: vide Sec. 16, Act 2 of 1913 and Sec. 41 of Act 3 of 1913. It is true that this is because of express statutory provisions, which have made exceptions, so to say, to the general rule contained in Sec. 80, C. P. Code. But we think that a receiver appointed by the Court under Or. 40, R. 1, C. P. Code, has a legal position different from that of the Official Trustee or the Administrator-General. Unlike the receiver, these officers have an estate in the properties which they hold by virtue of their office and consequently a suit in respect of the properties they hold, would be a suit against them in the legal sense. The same reasoning does not apply to a receiver. My conclusion therefore is that the suit in the present case was not against the receiver as contemplated by Sec. 80, C. P. Code, and as such no notice was necessary. The result is that the appeal is allowed and the judgment and decree of the Court below are set aside.

The plaintiffs, having according to the findings of Court of Appeal below established their title to the property in suit, are entitled to a declaration of their title as against defendant 2. As against defendant 1, the suit would be decreed in terms of the compromise entered into between him and the plaintiffs. The plaintiffs' claim for mesne profits or compensation against defendant 2 would stand dismissed. The costs will be borne by the parties themselves in all the Courts. The cross-objections are dismissed with no order as to costs.

M.

(s c) 50 L. W. 349; A. I. R. 1939 (P. C.) 244; (1939) M. W. N. 1183; 184 I. C. 1; 12 Ind. Rul. (P. C.) 82.

PRIVY COUNCIL.

(Appeal from the Madras High Court).

Present :—Lord Romer, Sir George Rankin and Mr. M. R. Jayakar.

21st July, 1939.

Sri NADIMPALLI NARAYANARAJU and another

v.

YENNAMSETTI SURYANARAYUDU and others.

Madras Estates Land Act (Madras Act I of 1908) Secs. 3 (5) and 9—Recovery possession—Zamindar—Minor—Post-settlement inamdar—*Permanent* kattubadi—*Land-holder—Meaning of—Owner.*

Where a *zamindar* makes a post-settlement *inam* grant of a portion of a village with both *varams* on a permanent *kattubadi*, is the grantee a land-holder within the meaning of Sec. 3 (5) of the Madras Estates Land Act.

Held—That the minor post-settlement *inamdar* holding under a grant of both *varams* on a permanent *kattubadi* is a "land-holder" under the Madras Estates Land Act of 1908.

Mr. *P. V. Subba Row*—for the Appellants.

Messrs. *S. Hyam, Harold Shephard* and *Sydney Smith*—for the Respondents.

Sir George Rankin.—This is an appeal by the plaintiffs from a decree of the High Court of Madras (October 16, 1937), dismissing a suit brought in the Court of the Subordinate Judge at Vizagapatam to recover possession of certain agricultural lands in the village of Thagarampudi. The trial Court's decree (December 17, 1927), had been in favour of the plaintiffs. Of the defendants to the suit (who numbered 15) five are respondents to this appeal :the first three respondents (defendants Nos. 3 to 5) being the persons in possession of the suit lands, while respondents four and five (defendants Nos. 14 and 15) are impleaded as persons claiming title thereto as against the plaintiffs.

Much of the detail of the case has for the purposes of this appeal become unimportant; since the decree appealed from did not decide the question of title disputed between the plaintiffs and respondents four and five, but dismissed the plaintiffs' claim to eject the first three respondents on the ground that the

plaintiffs were land-holders within the meaning of the Madras Estates Land Act (Madras Act I of 1908) and by Sec. 9 thereof could not maintain ejectment in the Civil Court against a ryot.

The plaintiffs claim title under Ex. C, an instrument dated May 11, 1811, which is expressed as follows :

"Patta, dated Saturday the 3rd day of Vaisakha Bahulam of the year Prajotpatti (May 11, 1811), executed and granted by Sri Narayana Gajapathiraju Maharajulingaru, to Nadimpalli Venkatapatiraju.

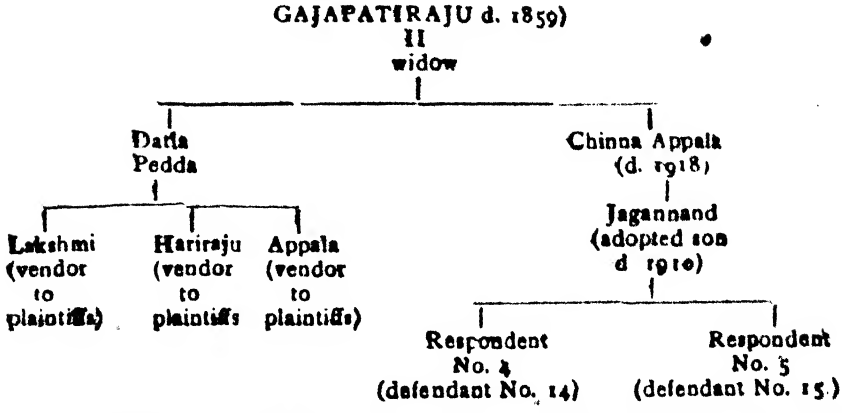
Whereas, in the village of Thagarampudi of my mokhasa (lands granted either free as reward or on light rent) Vaddade taluk, I have granted to you land fetching a fixed rent of Rs. 300, as manyam, and 10 visams (1/8th part) of land known as the vudika manu garuvu (name of land) for a top to be planted thereon you shall bring them to extensive cultivation and profits, and be living happily enjoying the same hereditarily."

The grantor was the proprietor of the estate of Vizianagaram and the grantee Venkatapatiraju was the eldest of three brothers who were joint. The other two were called Murtiraju and Gajapatiraju. By what right the grantor could afterwards modify his grant is a question which has not been clearly answered, but by a letter to the grantee dated August 21, 1826, he purported to impose for the future a rent or payment of Rs. 50 per annum and this has ever since been paid. The terms of the letter are as follows :

"In respect of the land granted to you in the village of Thagarampudi, a reduction of Rs. 50 has been ordered from the current year Vijaya, and deducted out of your muzara. So, you shall pay these Rs. 50 every year in our Sirkar and be obtaining receipts."

The lands were at first enjoyed by the joint family, but the brothers separated and each became entitled to a one-third share therein. At some date which is not now material they appear to have divided the lands between them each paying to the zamindar Rs. 16-10-8. The plaintiffs are great grandsons of the original grantee Venkatapatiraju who was the eldest brother, but their suit has reference to the one-third share of the youngest brother Gajapatiraju of which they claim to be purchasers. They seek to obtain possession of one-half only of that one-third share, and the pedigree table of Gajapatiraju's branch will assist to show how they deduce thir title.

NARAYANARAJU v. SURYANARAYUDU.



Gajapatiraju died in 1859 leaving a widow and two daughters. In 1861 the widow relinquished her interest and the daughters became entitled. In 1918 the younger daughter Chinna Appala died leaving her sister and two grandsons by a pre-deceased son (respondents four and five). The plaintiffs say that thereupon the whole of Gajapatiraju's interest vested in the elder daughter Datla Pedda: that in 1919 Datla Pedda's three sons were the reversioners of her father, and that she relinquished her interest so as to accelerate theirs. The plaintiffs by sale deed dated April 27, 1921, purchased from these three sons of Datla Pedda the whole of the interest of her father Gajapatiraju for Rs. 32,000. On September 24, 1924, they brought the present suit to recover possession of the half share in Gajapatiraju's lands which his younger daughter Chinna Appala had possessed. The first three respondents were also in possession of the other half share (which Datla Pedda had possessed) but as they had certain rights therein as mortgagees this other half share was not included in the suit.

Respondents four and five claim title to the suit lands by saying that the instrument of 1811 has long since ceased to have effect; that it created no more than a service tenure neither heritable nor transferable but resumable at will; that on the death of Gajapatiraju the lands were sequestered or resumed by the zamindar and re-granted as a new tenure to his widow; and that on her death one-half was granted to each of her two daughters separately. Hence respondents four and five claim to be entitled to the lands held by their grandmother Chinna Appala which are the lands in suit. Whether or not on this case

the first three respondents could claim to have a ryoti interest in the lands, it is clear that the plaintiffs could have no interest at all The plaintiff do not seek to avail themselves in any respect of the case made or evidence adduced by respondents four and five.

The first matter for consideration is the case made by the plaintiffs for ejectment of the first three respondents. These respondents are the cultivators in possession of the lands in suit. They or their ancestors (at some date not readily ascertainable) became tenants of the plaintiffs' vendors or their predecessors. Notice to quit has been given to these respondents but they claim that they are ryots with occupancy right who cannot be ejected by the Civil Court. The plaintiffs who have to succeed upon the strength of their own title disclose a title of which the root is the grant of 1811, and the question is as to the character of the right which they allege and prove. At one stage of the case it appears to have been contended (1) for the plaintiffs that the grant merely gave to the grantees the kudivaram interest on favourable terms (2) for the first three respondents, that agricultural tenants were on the land at the time of the grant so that it gave to the grantees the melvaram interest only. It is now conceded, however on both sides, and very properly, that the grant of 1811 was of both varms. Their Lordships are unable to attach importance for the purposes of this appeal to the documents upon which the plaintiffs based a contention that the zamindar had treated the grantees under Ex. C as ryots giving them the usual jirayati leases. The operation and effect of Ex. C as a document of title cannot be determined upon the basis of subsequent documents which contradict it on essential matters. Their Lordships are not satisfied on the other hand by any of the exhibits that at the date of the grant of 1811 agricultural tenants other than the grantee were already on the land.

The question which presents itself on the threshold of the case, and which has been decided by the High Court against the plaintiffs, is whether the interest granted by Ex. C is one which constitutes the plaintiffs land-holders within the meaning of the Act of 1908. The words mokhasa and manyam occur in the grant and both appear in Wilson's Glossary as meaning in the south of India lands held either at a low assessment or altogether free on condition of or in consideration of services.

The word inam does not appear in the terms of the grant. The word muzara appears in the letter of 1826 and the words muzara-vasathi appear in some of the later documents: they are said to mean "allowance" or "remission." The word kattubadi (translated by "quit rent" for want of a nearer word) appears in the plaintiffs' conveyance of April 27, 1921, to describe the annual payment under Ex. C. But the title upon which the plaintiffs seek ejectment is put forward as a transferable and heritable right to the lands under Ex. C. upon payment to the zamindar of the annual sum of Rs 50 or a due proportion thereof. If this would constitute the plaintiffs "land-holders" under the Act of 1908 then the first three respondents claim to be ryots entitled to a permanent right of occupancy under Sec. 6 and protected from ejectment by the Civil Court under Sec. 9 of the Act.

The definitions which bear upon the question whether the plaintiff's title if made out gives them the status of a "land-holder" are to be found in certain sub-sections of Sec. 3 of the Act.

"By sub-Sec. (2), 'Estate' means—

(*a*) any permanently settled estate or temporarily settled *zamindari*;

(*b*) any portion of such permanently settled estate or temporarily settled *zamindari* which is separately registered in the Office of the Collector;

(*c*) any unsettled *palaiyam* or *jagir*;

(*d*) any village of which the land-revenue alone has been granted in *inam* to a person not owing the *kudivaram* thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village;

(*e*) any portion consisting of one or more villages of any of the estates specified above in Cls. (*a*), (*b*) and (*c*) which is held on a permanent under-tenure.

By sub-Sec. (5), "Land-holder" means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law.

By sub-Sec. (11), 'Rent' means whatever is lawfully payable in money or in both to a land-holder for the use or occupation of land in his estate for the purpose of agriculture.

By sub-Sec. (15), *ryot* means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the land-holder the rent which is legally due upon it.

By sub-Sec. (16) *ryoti* land' means cultivable land in an estate other than private land."

On these definitions it is to be observed that Cl (d) of sub-Sec. (2) relates to a grant made prior to the Permanent Settlement and to a village not now part of a zamindari whereas Cl. (e) relates (though not exclusively) to villages which are part of a zamindari but are held on permanent under-tenure. The lands now in question do not constitute a village but are only part of a village and they cannot be held to come within any of the clauses which define the word "estate." On the other hand the word "estate" as employed in the Act has not the abstract meaning "quality or quantity of the interest of the holder." The plaintiffs' title if made out can only constitute them "land-holders" upon one or other of two grounds. First, that they come within the words in sub-Sec. (5) "or part thereof." Secondly, that they are within the extended meaning given to the word "land-holder" by the provision that it "includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title." The application of these expressions to what have been called "minor inams" has been considered by the High Court of Madras in a series of decisions. In 1912 in APPALANARASIMHULU v. M. SANYASI (1) it was held by Sundara Ayyar and Sadasiva Ayyar, JJ. that though a minor inam was not an "estate" within the Act the inamdars were land-holders because "there is no reason why the holder of an under-tenure should not be held to be a person entitled to collect rents of a portion of the estate out of which the under-tenure is carved." The learned Judges considered that "if the tenure-holder is not bound to make any payment to the zamindar for his tenure he will then be a person owning a part of the estate." In GADADHARA DAS v. SURYANARAYANA (2) Wallis, C. J. dissented from the conclusion that a minor inamdar was a "land-holder." He was of opinion that so long as the zamindar reserves an interest to himself, as by way of rent, no matter how insignificant it be, he continues to be the owner. He considered that in the definition of "rent" in sub-Sec. (11) the words "in his estate" could not apply to an inamdar and excluded such a person from the extended meaning given by the clause which refers to persons entitled to collect the rent of a portion of an estate. Sadasiva Ayyar, J. however

(1) 17 I. C. 120; A. I. R. 1916 Mad. 619; 38 M. 33.
(2) 14 L. W. 453; (1921) M. W. N. 413; 41 M. L. J. 97; A. I. R. 1921 Mad. 547; 64 I. C. 317; 44 M. 677.

held the inamdar to be a land-holder on both of the grounds already mentioned. As to the first ground, he laid stress on the fact that in the case of an entire village Cl. (e) of Sec. 3 (2) treats a permanent under-tenure as an estate and its holder as owner of the estate. He considered that there was already a catena of decisions in the High Court that a minor inamdar was a land-holder. When this case came before three Judges on Letters Patent Appeal Ayling, J. took the view that " it may be conceded at once that so long as the zamindar reserves to himself a quit rent, the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term." But on the second ground he thought it clear that when the inamdar's grant was only of the melvaram, it was a transfer by the owner of the right to collect the rent of a portion of the estate. Where, however, the grant was of both varams, he had more difficulty but came to the same conclusion : " When we say that the grant was of both varams we merely mean that the rights of the grantee in respect of the land were not limited by the necessity of respecting the right of any person possessed of the kudivaram at the time of the grant." Coutts-Trotter, J. proceeded entirely upon the second ground observing that he was unable to gather from the language of this Act any general intention with regard to the position of minor inamdars. Kumaraswami Sastri, J. held that a minor inamdar was not a land-holder where the grant to him was of both the varams. He thought that if the grantee was himself the occupancy ryot at the time of the grant, it could not divest him of that character and convert his sub-tenants into occupancy ryots ; while if the land was at the time in the absolute disposal of the grantor, the object of the grant was to allow the grantee to occupy and enjoy the lands on favourable terms and not to create minor land-holders. In such cases he considered the grantee could not be regarded as collecting rents from himself by virtue of the grant of the melvaram. The result of the Letters Patent Appeal was that by a majority of two Judges to one the minor inamdar was held to be a landh-older.

The matter came before a Full Bench in BRAHMAYYA v. ACHIRAJU (1) where the patta had been held to be a grant in

(1) 31 M. L. T. 91 (F. B.) ; (1922) M. W. N. 280 ; 43 M. L. J. 229 ; A. I. R. (1922) Mad. 373 ; 70 I. C. 615 ; 45 M. 716.

inam and not a mere lease on favourable terms to a jirayati tenant. The question was framed as follows :—

"Where a *samindar* makes a post-settlement *inam* grant of a portion of a village with both *varams* on a permanent *kattubadi*, is the grantee a land-holder within the meaning of Sec. 3 (5) of the Madras Estates Land Act?"

Schwabe, C. J. thought that such an inamdar was not owner of a part of the estate and was not entitled to collect rent by virtue of any transfer. The provison as to persons entitled to collect rent was in his opinion intended for purchasers of part of an estate, mortgagees' or farmers of an estate and did not apply to an inamdar collecting rent under leases granted by himself. Oldfield, J. found the considerations upon each side to be evenly balanced and the question difficult He thought the liability of the inamdar for quitrent need not be regarded as inconsistent with the character of land-holder under the Act but that in any case a grantee of both varams of a part of a village was a person entitled to "collect the rent by virtue of a transfer from the owner," and that this very general language could not be read subject to an unexpressed restriction. Phillips, J. held that the word "owner" was applicable to the inamdar notwithstanding the reservation of an annual payment and that the grantee of both varams was entitled to collect rents which would previously have been payable to the grantor. Devadoss, J. relied much on the definition of "estate" as excluding mere parts of villages :

"The word estate does not mean land but all the rights, liabilities and duties attaching to or incident to certain classes of tenure as defined by Sec. 3 (2). The words 'part of an estate' have been put into the definition of land-holder so as to include the transferee of a portion of the estate either by operation of law or by act of parties. An *inamdar* is not a transferee of the whole or any portion of the estate."

He further considered that where the grant is of vacant land the inamdar is not to be considered as having the right to collect rent but as having the kudivaram right himself plus a portion of the melvaram, and does not lose the character of ryot. Venkatasubba Rao, J. regarded the definitions of "estate" and "land-holder" as inconsistent but thought it more in consonance with the intention of the Legislature to regard minor inamdars as land-holder. He considered that they were

owners of part of an estate notwithstanding liability for kattubadi and that they come within the language of sub-Sec. (5) as persons entitled to collect rents.

By this decision of three Judges against two, after long debate and much difference of opinion it was established by authority of the highest Court of the Province in March, 1922, that the minor post-settlement inamdar holding under a grant of both varams on a permanent kattubadi is a "land-holder" under the Act of 1908. This decision was confirmatory of a course of decisions that had been given since 1912 and earlier though not without some dissent. For a considerable number of years tenants under such inamdars have been entitled to rely upon the special protection granted by the Act to ryots and their Lordships would be loath to disturb titles taken or dealt with on that footing. They do not conceal from themselves that neither of the two grounds above-mentioned is free from difficulty. They discard all argument from the presumed general intention of the Act as treacherous and inconclusive. But they cannot agree that "part of the estate" or "portion of the estate" does not refer to the land itself by the word "estate" nor do they feel any confidence in the doctrine that so long as the zemindar reserves any interest, however insignificant, a permanent grantee from him cannot be the owner. It may be that the words "or part thereof" were given a place in the definition of land-holder without full appreciation of their effect in connection with the definition of estate": but there is no presumption to that effect : the words cannot be ignored : and good reason must be found in the Act itself for restricting their prima facie meaning. Their Lordships, as to the second ground notice that not only does the definition of "estate" employ the word "estate" but the definition of "land-holder" employs the word "rents" and the definition of "rent" employs the word "land-holder." They feel more difficulty than was felt by the majority of the learned Judges in Madras in regarding the extension, given to the meaning of the word "land holder" by the clause as to collection of rents, as applicable to an inamdar. But on either ground they are satisfied that the Full Bench decision of 1922 represents a careful and reasonable solution of a stubborn ambiguity in the Act, and that it ought not now to be overruled having regard to the time which has elapsed and to the character of the interests affected thereby. They are

wholly unable to distinguish the present case so as to regard the reasoning of the majority of the Full Bench as inapplicable thereto, nor can they hold that Ex. C is a mere jirayati patta on favourable terms. The plaintiffs' title, if it be made out, is to a permanent under-tenure of a portion of a village on a small annual payment by whatever name the payment may be described. In their Lordships' judgment they claim an interest which must be held to clothe them with the character of landowner and to put the cultivating tenants under them in the position of the ryots, to whom Secs. 6 and 9 apply. The plaintiffs' claim to eject the first three respondents must therefore fail.

It was contended that even so the High Court ought not to have dismissed the suit without deciding the dispute as to title between the plaintiffs and respondents four and five. Their Lordships, however, are to prepared to remand the case for a decision on this point. Having regard to their pleading, the plaintiffs have no right to such an order since they impleaded respondents four and five without asking for any declaration as to title against them and merely as persons who might object to the relief sought against the first three respondents. The matter is one to be decided now upon the balance of convenience to the parties on both sides and heir Lordships see nothing to induce them on this point to interfere with the decree of the High Court which has left the question of title open.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay one set of costs to the first three respondents and another to the fifth respondent.

Messrs. *Douglas Grant & Dold*—Solicitors for the Appellants.

Messrs. *Barrow, Rogers & Nevill*—Solicitors for the Respondents.

M.

(s c) (1939) I L. R. 2 Cal 532 ; (1940) A. I. R. Cal 30.

Criminal Reference No. 86 of 1939.

Present :—McNAIR AND KHUNDKAR, JJ.

July 13. 1939.

CH UDHURY BEJOY KRISHNA DEB.

v.

THAKUR SHYAM NARAYAN SINGH.

Cr P Code Sec 438—Proceeding before any inferior Court—District Magistrate acting in an executive capacity.

Where the word "proceeding" which is used in Sec. 438 must be a proceeding as referred to in Sec. 435, that is to say, a proceeding before any inferior Criminal Court. The Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity.

Held that—Court refused to interfere because in the first place the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it.

The facts appear from the judgment.

Sir *A. K. Roy* (*Advocate-General*) and *A. C. Roy Chowdhury*—Against reference.

McNair, J.—This is a reference under Sec. 438, Cr. P. Code, by the District and Sessions Judge of Midnapur. The facts are simple. One Mahadeo Singh, an employee of Thakur Shyam Narain Singh, had started on pilgrimage to Puri on one of his master's elephants. They stopped near a village named Kushmai to cook their food. The elephant which was chained nearby somehow escaped into the jungle and was subsequently captured by choudhury Bijoy Krishna Deb. The captor informed the District Magistrate of the circumstances by a petition filed in his Court. The petitioner alleged that the elephant was causing damage to property and interfering with traffic and that the petitioner after much effort "baged the said elephant in his own house at a cost of about Rs. 700." The petitioner further stated that noboly claimed the elephant and he asked leave to keep it. The learned District Magistrate granted leave pending an inquiry, and the fact that the elephant was found was advertised, and the District Magistrate at once wrote to the Chief Secretary to the Government of Bengal stating the facts and asking for instructions. Thakur Shyam Narain Singh put in his claim to the elephant which was admitted after investigation and the District Magistrate ordered the elephant to be returned to him forthwith. The captor then claimed nearly Rs. 2000 for his costs of the capture and for feeding the

elephant." The District Magistrate considered this figure exorbitant and after directing the captor to appear before him he assessed the costs of capture at Rs. 150 and the costs of feeding the elephant at Rs. 100 a month. He then directed the owner to deposit that amount in Court within three days. The owner appealed to the District Judge who has referred the matter to this Court treating the appeal as a petition for revision. In his report the learned Sessions Judge says that the appeal filed before him was evidently under the impression that the learned District Magistrate was acting under Sec. 523, Cr. P Code. He thereupon called upon the Additional District Magistrate for a report. The Additional District Magistrate sent a report in which he said that the orders were purely executive in character as distinguished from judicial and cannot from the subject-matter of a criminal appeal. The learned Session Judge then sets out his reasons for saying that no appeal lay under Sec. 523, because the seizure of the elephant was not by a police officer, nor was the elephant captured in circumstances creating suspicion of the commission of any offence. He then say that the question however is whether the order passed by the learned District Magistrate is liable to revision by the High Court and if so, whether it should be revised. He states his own view that the District Magistrate's order passed by him was in the capacity of a Magistrate. He considers that the District Magistrate's order was without jurisdiction and he argues that because a District Magistrate derives his powers principally from the Cr. P. Code, he may be presumed to be acting under the Cr. P. Code, or, in other words, all his orders may be presumed to be judicial rather than executive and his conclusion is that such orders are liable to revision by the High Court under Secs. 435 and 438, Cr. P. Code.

This opinion of the learned Sessions Judge seems to me to lose sight of the fact that the District Magistrate acts in a dual capacity. In this instance the fact that the learned District Magistrate at the outset wrote to the Political Secretary to the Government of Bengal asking for orders suggests that he was not acting in a judicial capacity but possibly in an executive capacity. Again there was no suggestion of a criminal offence and there was no proceeding of a criminal nature. Sec. 5, Cr. P. Code, provides for the investigation of an offence under the Penal Code according to the provisions contained in the Cr P. Code and sub-Sec. (2) of the same

Section provides that all offences under any other law shall be similarly investigated subject to any enactment for the time being in force regulating the manner or place of, investigating, inquiring into, trying, or otherwise dealing with such offences. Sec. 6 enumerates the classes of Criminal Courts, class 3 being Magistrates of the First Class. Sec. 10 provides that in every district outside the presidency towns the Local Government shall appoint a Magistrate of the First Class who shall be called the District Magistrate and indeed in this case the learned District Magistrate has been appointed by the Local Government under the provisions of Sec. 10. But because the learned District Magistrate has been invested with certain powers under Sec. 10, it does not follow that he has not other powers which are not contemplated by the Cr. P. Code, as is pointed out by learned District Magistrate in his letter of explanation. He is in addition the Collector of the District. He is also the District Officer and in those capacities he has to perform many functions which are not covered by Cr. P. Code.

The provisions relating to reference and revision, which are relevant to this enquiry, are found in Secs 435 and 438. Sec. 435 provides that the High Court or any Sessions Judge or certain other officers may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. Sec. 438, under which this reference has been made, empowers the Sessions Judge, on examining under Sec. 435 or otherwise the record of any proceeding to report for the orders of the High Court the result of such examination. It is quite clear that the word "proceeding" which is used in Sec. 438 must be a proceeding as referred to in Sec. 435, that is to say, a proceeding before any inferior Criminal Court, and there is authority for this proposition. There was not in the present instance any "proceeding" so as to empower the learned Sessions Judge to report under Sec. 438. The learned District Magistrate has given his opinion that he was acting in an executive and not in a judicial capacity and it has been held in several reported cases that the Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity. The question arose before a Bench of this Court IN THE MATTER OF

ROHOMAN SIRKAR (1) where the High Court while considering that an order by a Magistrate professing to act under Sec 17 of the police Act of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature. The point of that decision is not that the order was illegal but that the Court considered that it was an order of an executive nature with which this Court had no power to interfere. If an order under Sec. 17 of the police Act is an executive order, it seems to me clear that an order of the nature now before us might be an executive order but would certainly not be a judicial order.

The learned Advocate-General, who opposes this reference, has referred us to Secs. 25, 26 27 and of the police Act. Sec. 25 empowers a police Officer to take charge of unclaimed property and to dispose of it under the orders of the District Magistrate. Sec. 26 empowers the Magistrate to detain the property and to issue a proclamation requiring any person who has any claim thereto to appear and establish his right within six months. Sec 27 provides for confiscation of the property if no claimant appears. It has been suggested that possibly these sections were in the mind of the District Magistrate when he issued the proclamation to which I have already referred. The learned Sessions Judge in his report has stated that the real grievance of the petitioner is that though if the animal were impounded which it is suggested would have been the correct procedure, the charges payable by him could not have exceeded Rs. 93, yet he was being ordered to pay Rs. 550 by the District Magistrate. The learned District Magistrate suggests that the Cattle Trespass Act does not apply. The only reference to the Cattle Trespass Act in the Cr. P. Code is in Sec. 4, sub Sec. 1 where 'offence' is defined as any act or omission made punishable by any law for the time being in force including any act in respect of which a complaint may be made under Sec. 20, Cattle Trespass Act of 1851. No complaint has in fact been made in this case under Sec. 20 and it has also been pointed out to us that under Sec 31, Cattle Trespass Act, the local Government has transferred the powers of the District Magistrate under that Act to the District Board so that the District Magistrate has no longer power to act under the Cattle Traspass Act unless a complaint has been made under Sec. 20.

(1) 18 W. R. 67 ; (1872) 19 Beng. L. R. App. 4.

The other point which arises and which in my opinion prevents this Court from interfering is that the order although the learned District Magistrate suggests that it was made in his executive capacity was not in my opinion even an executive order. It was, it appears to me, merely advice. An inflated charge had been made by the captor. The owner objected to this strongly and the learned District Magistrate in the capacity apparently of an arbitrator gave an opinion which seems to me very reasonable as to the probable costs of capture and feeding of the elephant. The order was not enforceable and it is only when an order has been made, and for non-compliance of that order some penalty has been exacted that this Court will interfere. This proposition was stated very clearly by Jackson J. in THE EMPRESS v. SURJA NARAIN DAS (1). The portion to which I refer is at p. 90. The learned Judge there says :

> When the Cr. P. Code authorizes the making of orders by executive authorities with the view of preventing a breach of the peace or for similar purposes it has always been held and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not.

In the case to which I have referred in IN THE MATTER OF ROHOMAN SIRKAR (2) the Court refused to interfere upon an order made under Sec. 17, Police Act. But there are authorities to show that the Court has interfered under Secs. 19, 28 or 29, Police Act, where the orders were not made in a judicial capacity but because persons had been convicted and fined. To sum up we are unwilling to interfere in this reference, because in the first place the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it. The reference is rejected.

Khundkar J.—I agree. To the reasons already given by my learned brother in the judgment just now delivered by him, I may add that I entertain considerable doubt whether the order in question is an order at all. It was submitted by the learned Advocate-General that at best it was an executive order;

(1) (1881) 6 Cal. 88.
(2) 18 W. R. 67 ; (1872) 10 Beng. L. R. App. 4.

but no law, proclamation or other direction has been cited which gives the District Magistrate any power, executive or otherwise, to assess the proper sum of money which ought to be paid by the owner of an animal to the custodian thereof in circumstances similar to those which have happened in this case. The learned Magistrate was not acting under the Police Act, the Cattle Trespass Act, or even in pursuance of any rules framed or orders passed by the Government. He seems to have been acting in the role of an arbitrator, more or less self-constituted. The order was as my learned brother has observed merely a piece of advice. It was not in any way enforceable and it was open to the parties to ignore it altogether. At the time when the so-called order was made the rights of the parties were regulated as indeed they are still by the civil law. That position has not in any way been altered or prejudiced by the Magistrate having said that the captor of the elephant would make the elephant over to the owner upon the latter depositing the sum which the Magistrate though fair.

M.

(s. c) 44 C. W. N. 118 ; (1940) A. I. R. Cal. 6.

Appeal No. 935 of 1937.

Present :—EDGLEY, J.

4th July, 1939.

ANANDA PROSAD TALUKDAR and others

v.

RAMJAN SARKAR.

B. T. Act—Sec. 26-B of the Amended Act—Sec 87—Abandonment—Ejectment.

Sec. 26-B of the Amended B. T. Act is not retrospective in its purpose and can not operate to compel the landlord to recognise as his tenant a person to whom a portion of a holding has been transferred before the Amended Act of 1928 came into operation. This new section does not affect the right of the landlord to re-enter under Sec. 87 of the Act of the tenant vacated the holding without arranging for the payment of his rent as it fell due.

The facts appear from the Judgment.

Bireswar Bagchi and *J. N. Das*—for the Appellants.

K. K. Maitra and *M. C. Roy*—for the Respondent.

ANANDA PROSAD v RAMJAN.

Judgment.—In the suit with reference to which this appeal arises the plaintiffs sought to eject the defendant, Ramjan Sarkar, from certain land. Their case was that a man Maniruldin was their tenant in respect of a holding with an area of 1·76 acres and that on 17th Aswin 1335 B. S. corresponding to 3rd October 1928, i.e., before the passing of the Bengal Tenancy Act of 1928, he transferred one acre of this holding to the defendant Ramjan Sarkar. Subsequently, after the passing of the Act of 1928, Manirud lin transferred the remainder of the holding to Kalipada Bhattacharjee. The transfer took place on 28th February 1934. The plaintiffs then applied for pre-emption of the portion of the holding which had been transferred to Kalipada Bhattacharjee and an order for pre-emption was duly made in their favour. Subsequently, on 10th January 1936, the plaintiffs instituted the suit out of which this appeal arises for the purpose of ejecting Ramjan Sarkar from that portion of the holding which had been transferred to him in 1928. The main defence put forward by Ramjan Sarkar was to the effect that, under the law as it stood after the passing of the Bengal Tenancy Amendment Act of 1928, he was not liable to ejectment. The first Court dismissed the plaintiffs' suit on two grounds. The first was to the effect that under the present law a subsequent transferee steps into the shoes of the former tenant. Therefore in the event of such a transfer there can be no abandonment of a holding within the meaning of Sec. 87, B. T. Act and the previous purchaser obtains protection under the shield of the purchase by the subsequent transferee.

The second ground on which the learned Munsif decided the case in favour of the defendant was that the plaintiffs could not take advantage of their own purchase for the purpose of treating the entire holding as having been abandoned. The lower Appellate Court upheld the decision of the first Court on the second of the two grounds mentioned above but the learned Subordinate Judge did not consider it necessary to discuss the first ground upon which the case has been decided in the defendant's favour by the first Court. The first point urged in favour of the appellants is to the effect that both the Courts below were wrong in dismissing the plaintiffs' suit on the ground that they cannot take advantage of their own purchase for the purpose of treating the entire holding as having been abandoned. In support of the view which has been adopted by

both the Courts below reliance was placed upon a decision of this Court in SOROJINI v. ROMESH CHANDRA (1). In that case the plaintiff was the landlord of a non-transferable occupancy holding a portion of which had been previously transferred by the tenant who however retained the homestead portion of the holding. The plaintiff subsequently obtained a decree for arrears of rent, purchased the homestead and took possession of the same. On the basis of her purchase she then sought to treat the entire holding as having been abandoned and she sued to recover that portion of the holding which had been previously transferred by the tenant. Mitter J. held that :

It is now well settled that for the purpose of abandonment, a sale in invitum stands on the same footing as a transfer by the act of the occupancy raiyat, and for the purpose of constituting abandonment, the transfer of the entire holding need not be effected all at once. If the entire holding is sold but in parts at different times, it will amount to abandonment as soon as the last transfer is made.

The learned Judge held however that as the plaintiff by her purchase stepped into the shoes of the tenant, on the principal adopted in MOHSENUDDIN v. BHAGABAN CHANDRA (2), she could not put forward her right as a landlord to re-enter the abandoned holding. The learned Judge therefore held that

the retention of her character as assignee of the tenant, i. e., of her character ars representative of the tenant, is inconsistent with her insisting on her claim to ecover possession on the ground of abandonment in her character as landlord.

In the present case however the plaintiffs' contention is that the holding was abandoned by reason of the sale by Maniruddin to Kalipada Bhattacharjee on 28th February 1934. They are not relying upon their pre-emption of a portion of the holding as enabling them to treat the whole of the holding as having been abondoned, but they maintain that their right to re-enter accrued as soon as the last portion of the holding, which had been retained by their original tenant, was transferred to Kalipada Bhattacharjee on 28th February 1934. They are therefore not relying upon their own purchase as giving them the right to re-enter, but upon the fact of the abandonment of

(1) 40 C. W. N. 269; 62 Cal. 1110; 165 I. C. 190; (1936) 23 A. I. R. Cal. 536.

(2) 25 C. W. N. 29 (F. B.); 32 C. L. J. 286; 48 Cal. 605; 61 I. C. 443; (1921) 8 A. I. R. Cal. 444.

the entire holding by the original tenant by reason of the sale to Kalipada Bhattacharjee. From this point of view therefore the fact that they subsequently pre-empted the holding under Sec. 26-F, B. T. Act, is immaterial. Had this been a case in which the plaintiffs were in fact seeking to take advantage of their own purchase for the purpose of treating the whole holding as having been abandoned, the question would have required serious consideration whether the principles laid down by a Full Bench of this Court in MOHSENUDDIN v. BHAGABAN CHANDRA (1) had not been applied somewhat too harshly against the landlord in RAHINI KUMAR DAS v. AMIRUDDIN KAVIRAJ (2) and SOROJINI v. ROMESH CHANDRA (3) and it is even possible that the principles laid down in MOHSENUDDIN v. BHAGABAN CHANDRA (1) might have required reconsideration in the light of the view expressed in connexion with this matter by a Full Bench of the Patna High Court in MT. SHEORAJI KUER v. DHANI MIAN (4). As matters stand, the only remaining question which requires determination is whether or not it can be said that the holding had been abandoned by reason of the transfer to Kalipada and if so, whether this abandonment gave the landlords the right to re-enter. With reference to this matter the learned advocate for the respondent places considerable reliance upon the first ground mentioned above upon which the trial Court dismissed the plaintiffs' suit Under the law as it stood before 1928 the two successive transfers of portions of the holding to Ramjan Sarkar and Kalipada Bhattacharjee would admittedly have constituted a complete abandonment on the part of the tenant which would have entitled the landlords to re-enter under Sec. 87, B. T. Act, sub-Sec (1) of which is in the following terms :

> If a raiyat or under-raiyat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due ceases to cultivate his holding either by himself or by some other person, the landlord may, at any time after the expiration of the agricultural year in which

(1) 25 C. W. N. 89 (F. B.) ; 32 C. L. J. 286 ; 48 Cal. 605 ; 61 I. C. 443 ; (1921) 8 A. I. R. Cal. 444.
(2) 35 C. W. N. 648 ; 137 I. C. 668 ; (1932) 19 A. I. R. Cal. 405.
(3) 40 C. W. N. 269 ; 62 Cal. 1110 ; 165 I. C. 190 ; (1936) 23 A. I. R. Cal. 536.
(4) 1 P. L. T. 402 (F. B.) ; 3 Pat. 1 ; 75 I. C. 794 ; (1924) 11 A. I. R. Pat. 1.

the raiyat or under-raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself.

In this connexion it was held by this Court in PROSONNA KUMAR DE v. ANANDA CHANDRA BHATTACHARJEE (1), that for a landlord seeking to re-enter it would not be necessary to prove as a fact that the holding had been abandoned but the abandonment would be a direct inference from the fact that the entire holding had been sold and possession had been given to the purchaser. It must however be considered whether the landlord's right of re entry on abandonment of a holding has been curtailed by the law as it stood after the amendment of the B. T. Act in 1928. One of the most important provisions B T. Amendment Act (Act 4 of 1928) was to enable an occupancy raiyat to transfer his holding or a share or a portion thereof. The provision to this effect was made in Sec. 26-B, B. T. Act, as it stood after amendment which is in the following terms :

> The holding of an occupancy raiyat or a share or a portion thereof together with the right of occupancy therein, shall, subject to the provisions of this Act, be capable of being transferred in the same manner and to the same extent as other immovable property.

The main effect of the above provision was to compel the landlord to recognize as his tenant the transferee of his former tenant's holding or of a portion thereof provided the transfer was made in accordance with the material sections of the B. T. Act. This new provision however was not retrospective in its purpose and could not therefore operate to compel the landlord to recognize as his tenant a person to whom a portion of a holding had been transferred before the Amendment Act of 1928 came into operation. Further as the right conferred by Sec. 26-B was subject to the provisions of the Act, the new Section did not affect the right of the landlord to re-enter under Sec. 87 of the Act if the tenant vacated his holding without arranging for the payment of his rent as it fell due.

In the case with which we are now dealing there is no doubt that the original tenant Maniruldin had completely severed his connexion with the holding and any proceedings which might have been instituted by the landlord to recover the rent of the holding from him would have been infructuous. It is true that, as long as Kalipada Bhattacharjee remained in

(1) 93 I. C 86 ; (1926) 30 C. W. N. 231.

possession of the transferred share, it might be argued that he would have been liable under Sec. 146-A, B. T. Act, as a co-sharer tenant in respect of the rent of the entire holding but there can be no doubt that his liability would have ceased as soon as his share was pre-empted under Sec. 26-F of the Act. Further, even if the landlord had decided not to avail himself of his right to pre-empt, the transferee tenant might have applied for a devision of the tenancy under the second proviso to Sec 88, B T. Act If such division had been ordered by the Court, the landlord would have been entitled merely to recover from the transferee the rent due in respect of the transferred portion only and not rent for the entire holding. It cannot therefore be said that the transferee of a portion of a holding steps into the position of the former tenant except as regards that portion of the holding which has been transferred to him. As long as the original tenant retains the holding or a portion thereof the landlord has some security for the payment of his rent. If, on the other hand, the original tenant severs his connexion with the holding in a case such as that with which we are now dealing the only method by which the landlord can safeguard his interest is by pre-empting the portion transferred or by attempting to recover rent from the transferee in respect of the entire holding. As already pointed out, such a course will afford the landlord no guarantee that he will be able to recover rent for any portion of the holding that may have been transferred previously by the original tenant unless that tenant has made proper arrangements for the payment of the rent as it falls due. The utmost that can be said in the present case is that Maniruddin on severing his connexion with the holding on 28th February 1934, had made arragements which would safeguard the position of the landlord as regards the recovery of rent for that portion of the holding which was transferred to Kalipada Bhattacharjee on 28th February 1934, but he had made no such arrangement with regard to that portion of the tenancy which had been transferred to Ramjan Sarkar in September 1928, before the passing of the B. T. Amendment Act. In this view of the case, Maniruddin must be treated as having abandoned his holding within the meaning of Sec. 87, B. T. Act. The landlords are therefore entitled to re-enter and may evict Ramjan Sarkar from that portion of the holding which was transferred to him in September 1928.

Having regard to the considerations mentioned above, the

decision of the lower Appellate Court cannot be supported and this appeal is accordingly allowed with costs throughout. The plaintiffs will therefore be entitled to have the suit decreed. Leave to appeal under Cl. 15 of the Letters Patent is refused.

B.P.C.

(1940) 12 Ind. Rul. P. C. 94; 185 I. C. 219.

PRIVY COUNCIL.

(Appeal from the Patna High Court.)

LORD ROMER, SIR GEORGE RANKIN and MR. M. R. JAYAKAR.

October 10 1939.

CHANDAN MULL INDRA KUMAR and others

v.

CHIMAN LAL GIRDHAR DAS PAREKH and another.

C. P. Code Or. 26 Rr. 9 and 10—Commissioners report—Principle to be adopted.

Held that—Where inference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

The facts appear from the Judgment.

Messrs. *L. L. Cohen, K. C.* and *W. W. K. Page*—for the Appellants.

Messrs. *A. M. Dunne, K. C.* and *J. M. Pringle*—for the Respondents.

Lord Romer.—This is an appeal from the judgment and decree of the High Court of Judicature at Patna, dated April 1, 1937, which reversed a judgment and decree of the Subordinate Judge of Dhanbad dated February 21, 1933, and dismissed the appellants' suit.

The question for decision is whether the appellants or some of them are entitled to recover damages from the respondent by reason of the respondents having cut and removed coal under a certain area of land which will be described later. . .

The appellants' claim to the coal in question is founded upon a lease or rather a sub-lease dated July 17, 1908

(hereinafter called the sub-lease) whereby there was demised to the Phularitand Coal Company Limited (hereinafter called the Phularitand Company) coal under the land described in the 3rd Schedule thereunder written and also delineated and described in the map or plan thereto annexed and thereon coloured blue. Amongest the land described in the 3rd Schedule was land situate in the Mauza Ganeshpur and described therein as being bounded on the north by the Mauzas Buddora and Kenduadhi. On the plan there is shown lying between what is marked as Ganeshpur on the south and what is marked as Kenduadhi on the north a streamlet or jore. The plan would seem to indicate that no part of this jore was situate in Ganesphur inasmuch as it is not coloured blue thereon. So far as the plan is concerned, therefore the northern boundary of that part of Ganeshpur which abuts on Kenduadhi is indicated as being the southern bank of the jore. The blue colour on the plan extends to that bank but no further.

In the month of March, 1926, the Phularitand Company went into voluntary liquidation with a view to effecting an amalgamation with the Baraboni Coal Concern, Limited (thereinafter called the Baraboni Company) by means of a sale to them of all its assets. On June 30, 1927, accordingly by an agreement of that date the liquidators of the Phularitand Company agreed to sell to the Baraboni Company as from April 1, 1926, the whole of the assets of the Phularitand Company. According to this agreement the liquidators were to retain possession of the assets until completion of the sale which did not take place until much later. It is alleged, however, by the appellants that the Baraboni Company was in fact put into possession of the assets upon April 1, 1926.

On January 29, 1928, the Baraboni Company who are the appellants No. 2 discovered that the respondents who were lease-holders of the coal under the western part of Kenduadhi were or had been working a seam of the coal under the jore. In the belief that for the reasons hereinafter stated such coal was included in the sub-lease they in conjunction with the appellant No. 1 Chandan Mull Indra Kumar instituted on August 29, 1930, the present suit against the respondents claiming a declaration of title, an injunction, and damages. The appellant last mentioned had in the year 1928 purchased some of the assets of the Baraboni Company and was under the

impression that his purchase included the coal under Ganeshpur. In this he was mistaken. It is now conceded, that he had no interest in that coal and he need no be further considered. Nor at the date of the institution of the suit had the Baraboni Company any property in the coal inasmuch as their purchase of the assets of the Phularitand Company had not been then completed. They based their claim to relief, however, upon their alleged possession of the dismissed coal since April 1, 1926, and merely brought in the Phularitand Company as formal defendants. But by order dated August 12, 1932, the Phularitand Company were struck out as defendants and added as plaintiffs and are now the appellants No. 3.

In view of what has been stated about the plan attached to the sub-lease, it would not appear at first sight that the appellants Nos. 2 and 3 could have any right to complain of the working by the respondents of coal under the jore. Their claim to do so, however, was as set out in their plaint founded upon the following allegations. They said in effect that the true boundary between Mauza Ganeshpur on the south and Mauza Kenduadhi on the north was the jore as shown on the Revenue Survey map of 1862; that the said jore had since then gradually shifted its course towards the south with the result that it was now wholly within the boundaries of Mauza Ganeshpur; that the respondents had no right to any coal lying to the south of the old jore as depicted in the Revenue Survey map; that the coal lying under the strip of land described in Sch. B to the plaint was, therefore, the property of the appellants; and they claimed a declaration to that effect. Such Schedule so far as material was as follows:

> Boundary of the disputed strip of land as referred to hereinbefore.
>
> North. By the jore (streamlet) as it is existing in the Revenue Survey map to the midland (sic).
>
> South. By the present jore (streamlet.)

It is to be observed that in this Schedule the northern boundary of the coal claimed by the appellants is the "midland" (which is no doubt a misprint for the "midline") of the jore as shown on the Revenue Survey map; whereas in the body of the plaint it is merely alleged that the respondents have no right to the coal lying to the south of the jore. But however

this may be, their Lordships are satisfied on a careful examination of the map that the boundary line between the mauzas in question is therein shown to be the south bank of the jore. A similar conclusion was come to by the learned pleader and Commissioner Hem Chandra Roy whose position in the matter will be stated hereafter. In the course of giving evidence at the trial of the suit he said: "According to the Revenue Survey map the jore is within the limits of Mauza Kenduadhi." No reference is made in the plaint to the fact that on the map annexed to the sub-lease the jore purports to be shown and is not coloured blue. Now it might be contended that the jore there shown was intended to be the jore in the position it occupied at the date of the sub lease; in which case, in order to establish their right to the coal under the jore in the position it occupied at the time of the respondents alleged wrongful workings the appellants would have had no proof a shifting of the jore's position since 1903. It seems, however, far more probable that the plan merely intended to record the fact that the northern boundary of Ganeshpur was the northern boundary of the coal demised and that such boundary was the southern bank of the jore as it had been shown to be on the Revenue Survey map, and was in no way concerned with the question whether the jore had altered its position since 1862.

A written statement was filed by the respondent No. 2 in which a great number of defences were raised. Of these the only one that need be referred to is the allegation that the jore in the position it then occupied was the true boundary between Ganeshpur and Kenduadhi and that if that position differed from the one shown on the Revenue Survey map, the Revenue Survey map was wrong.

On July 24, 1931, the first two appellants (the then plaintiffs) petitioned the Court for the appointment of a Commissioner with directions to him (amongst other things) (a) to prepare a map of the locality (b) to find out the intermediate boundary line between the plaintiffs' land and that of the defendants' by reference to the Revenue Survey map and title deeds of the parties (if necessary) (c) to ascertain the encroachment, if any made by the defendants on the plaintiffs' land with reference to such intermediate boundary line, as also the quantity of coal cut therefrom. This petition was successful and on August 5, 1931, Babu Hem Chandra Roy, Pleader, to whom reference has

already been made, was appointed Commissioner for the purposes above-mentioned.

The Commissioner in due course made a careful survey of the locus in quo and embodied the result of such survey in a map on the scale of 16 inches to the mile. On this map he indicated the then position of the jore and also its position as indicated on the Revenue Survey map of 1862. He found himself able to ascertain the latter position (as he explained to the Court in his first report of September 14, 1931) in the following way: He was in possession of the Revenue Survey map and of the Revenue Survey field book. On that map were indicated two tri-junction pillars marked C and C and the Commissioner was satisfied that these corresponded practically with the two survey stations on his own map marked 1 and 20. Now the position of what may be called the Revenue Survey jore so ascertained by the Commissioner and indicated on his own map by a red line is a substantial distance to the north of the present position of the jore. It is plain, therefore, that any working of the coal to the south of that red line was a wrongful act on the part of the respondents unless (1) the Commissioner was wrong in his identification of his survey points 1 and 20 with the points C and C on the Revenue Survey map or (2) the position of the jore in 1862 was not accurately shown on the Revenue Survey map.

At the date of his first report the workings of the respondents to the south of the position of the Revenue jore as shown on his map had long since been discontinued and the site of those workings was full of water and could not be surveyed by him. The mine was accordingly pumped dry by the appellants at a considerable cost and the Commissioner then made an inspection of the workings. The result of his inspection was embodied in a further report dated April 16, 1932, and illustrated on a second map. He calculated that 15,753 tons of coal had been removed by the respondents to the south of the Revenue jore as shown upon his first map. It would appear from this second report of the Commissioner that the appellants had changed their views as to the way in which the position of the Revenue jore had shifted to the south. They no longer contended that the jore had gradually shifted its course but "that the present jore is nothing but a diverted course caused by the colliery proprietors and the village cultivators only during the recent years."

It was in these circumstances that this suit came on for hearing before the Sub rdinate Judge of Dhanbad in the month of August 1932. A great number of issues had been framed for trial of which the only ones material for the present purpose were substantially these :

(9) What is the correct intermediary boundary between *Mauza* Ganeshpur and Kenduadhi ? (10) Is the property described in Sch. B of the plaint included within the property described in Sch. A of the plaint ? (i. e., the property described in the underlease). (12) Have the defendants wrongfully extracted the plaintiffs' coal, and if so, what is the quantity ?

At the trial the appellants sought to discredit the accuracy of the Commissioner's maps particularly in so far as they indicated the position of the jore as shown on the Revenue Survey map. They contended (amongst other things) that the Commissioner was wrong in thinking that the survey points 1 and 20 on his first map corresponded to the points C and C on the Revenue Survey map. If they were right in this contention it is obvious that the position of the Revenue jore as shown on the Commissioner's map could not be relied upon. The learned trial Judge in his judgment of February 21, 1933, considered this as well as the other objections urged by the appellants against the accuracy of the Commissioner's maps and reports in great detail and with the greatest care. The Commissioner had himself given evidence at the trial and the learned Judge made an able and exhaustive analysis of that evidence and of the evidence of other witnesses. In the result, he found that the intermediate boundary between Kenduadhi and Ganeshpur and therefore the boundary between the coal of the appellants and the respondents was the Revenue jore as depicted on the Commissioner's maps. He accepted the Commissioner's findings as to the amount of coal extracted and decreed to the respondents damages at the rate of Re. 1-14-0 per ton of such coal.

The learned Judge does not appear to have considered the question whether the Revenue Survey of 1862 could itself be relied upon as showing accurately the position of the jore at that time.

The respondents thereupon appealed to the High Court at Patna where it came on for hearing before Sir Courtney-Terrell, C. J. and James, J. In the result, the appeal was allowed.

The Chief Justice thought that the sub-lease indicated quite clearly that the northern boundary of the present appellant's coal was the southern bank of the jore as it existed in 1908, and that as there was no evidence that the jore had shifted its position since that time the suit should have been dismissed. He thought that it was quite immaterial what was the boundary between Kenduadhi and Ganeshpur for the purpose of the Revenue Survey of 1862. Their Lordships find themselves unable to regard this as a satisfactory solution of the question in dispute. In their opinion the sub-lease included the coal under Ganeshpur up to the true northern boundary of that mouza as fixed by the Revenue Survey, that is to say up to the southern bank of the jore in the position that it occupied at the date of the Revenue Survey. The only question is whether that position was the same as the position that the jore now occupies. That was the view of the matter taken by James, J. He pointed out that no witness had deposed to any alteration having taken place in the course of the jore. He also gave his reasons for thinking that no such change as was alleged by the appellants could have taken place in that district without a convulsion of nature. In those circumstances he said there were two alternatives neither of which he thought impossible (1) that the Commissioner was unable to find the fixed points of the Survey of 1862 or (2) that the boundary was incorrectly plotted in that Survey. The first of these two alternatives had been rejected, and in their Lordships' opinion rightly rejected, by the Subordinate Judge. He had said :

> It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

This in their Lordships' judgment is a correct statement of the principle to be adopted in dealing with the commissioner's report. It is substantially the principle already laid down by this Board in RANEE SURUT SUNDREE DEBEA v. BABU PROSONNO KUMAR TAGORE (1). Nor indeed did James J. proceed

(1) 2 Sar. 632 (P. C.) ; 2 Suther 393 ; 6 Beng. L. R 677 ; 15 W. R. 20 (1870-71) 13 M. I. A. 607.

upon the first of the two alternatives propounded by him. He proceeded exclusively upon the second and did so in these terms

It appears to me clear from examining the Revenue Survey map that the delineation of the course of the nala shown therein is to be regarded with suspicion. The work of the Revenue Survey so far as it consisted of triangulation was certainly of the first class; but we are here concerned not with the question of whether the traverse survey then made was correct, but of whether the Amin who plotted the boundaries, working from the traverse lines, surveyed them correctly. The map is on a small scale; but it would on the face of it appear that the Amin did not survey the boundary at all, but merely sketched it in by hand . . . . I do not consider that it can be held to be proved that the nala ever flowed elsewhere than in its present position.

He then adverted to the facts that in his survey of the respondents' workings the commissioner had found that they had extended slightly beyond the southern bank of the jore. This encroachment the learned Judge considered to be quite negligible and one that need not be taken into account. With this judgment of James J. their Lordships find themselves in substantial agreement. In the first place there is no single witness who deposes to a shifting of the position of the jore. On the contrary the only four witnesses who dealt with that question all asserted quite definitely that the jore had never shifted its position during the time that they had known it. They were giving their evidence in the year 1932 and seem to have been familiar with the neighbourhood for about 20, 28, 14 and 16 years respectively. It is inconceivable that, if the jore had gradually shifted its position as stated in the appellants' plaint, or had been suddenly diverted by some colliery proprietors or village cultivators in recent years as they stated to the commissioner, these four witnesses should have been ignorant of the facts. The truth of the matter would seem to be that the idea of this shifting of the jore first occurred to the appellants in the year 1927, when the same commissioner, in making a survey of the present position of the jore for the purpose of litigation concerning another colliery situate to the east of the appellants' colliery, had discovered that the position of the jore as delineated on the Revenue Survey map was to the north of its present position. It is plain that the appellants' contention was not based upon any evidence but solely upon the map that the commissioner prepared in 1927. The appellants in other words are relying simply and solely upon the position of the jore being accurately delineated in the Revenue Survey map.

CHANDAN MULL INDRA KUMAR v. CHIMAN LAL GIRDHAR DAS.

In their Lordships' opinion the map cannot be trusted in this respect. If this map be accurate the jore must have shifted its position considerably since 1862. There is however no evidence to show that any change of position of a stream was either probable or even possible in that locality; and there is the oral evidence, to which reference has already been made, that no such change as alleged has taken place during recent years. There cannot therefore have been any gradual change of the stream or any change made in recent times by any cultivator or colliery owner and no other kind of change has been suggested by the appellants. It appears moreover from the evidence of the commissioner given at the trial that the revenue field book does not contain the offsets of the line of the jore. It is therefore at least possible, and in view of all the circumstances of this case, it seems to their Lordships highly probable that the Amin did not in 1862 survey the position of the jore at all, but in the words of James J. merely "sketched" it in.

This being so, the appellants have failed to discharge the onus that lies upon them of showing that the respondents have worked coal comprised in the appellants' under-lease. It is true that the commissioner's survey of the respondents' working indicates that to a small extent the respondents have taken coal from under land lying to the south of the jore. But no reference to any such working is to be found in the appellants' plaint. All that they alleged was that the respondents had worked some coal under the land described in Sch. B to the plaint, and it was only in respect of the coal under that land that they sought a declaration of title and damages. Now the land described in Sch. B did not extend further south than the jore. No application to amend however was made at any stage of the proceedings, and in their Lordships' opinion it would be quite wrong to give to the appellants any relief in respect of the respondents' comparatively small workings to the south of the jore. Had the appellants been correctly informed as to the true northern boundary of the coal comprised in their sub-lease this lengthy and very expensive litigation would never have been undertaken by them. They ought not to be allowed to avail themselves of the fact that in the course of their unsuccessful endeavour to establish their title to the coal under the land comprised in Sch. B they have discovered that a small quantity of coal to the value of little more than Rs. 2000 has been extracted by

CHANDAN MULL INDRA KUMAR v. CHIMAN LAL GIRDHAR DAS.

the respondents to the south of that land. They did not, in their plaint, claim any relief in respect of such coal and they cannot be heard to claim it now. For these reasons their Lordships are of opinion and they will humbly advise His Majesty that the appeal should be dismissed. The respondents' costs of the appeal must be paid by the appellants.

T. L. Wilson & Co.—Solicitors for Appellants.

H. S. L. Polak & Co.—Solicitors for Respondents.

B P.C.

BOMBAY.

(s.c.)I. L. R. (1939) Bom. 648 ; 41 Bom. L. R. 965 ; 185 I. C. 382 ; 12 Ind. Rul. 248.

Criminal Appeal No. 493 of 1938.

Present :—B. J. WADIA and KANIA, JJ,

May 9, 1939.

EMPEROR.

v.

JHINA SOMA.

Cr. P. Code Secs. 297 and 537—Judge to explain to jury all essential elements of offences—Criminal trial—Defences taken—Alternative—Inconsistant—Evidence led on behalf of the prosecution should have been believe by the jury.

Held—That under Sec. 297 Cr. P. Code it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative and it cannot be too emphatically stated that in cases tried with the help of a jury it is the clear duty of the Judge to explain what in law are the essential requisities of an offence and what must be proved to constitute that offences.

Held again—That in a Criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistant, that would dot necessarily prove that the

evidence led on behalf of the prosecutions, who must establish the guilt of the accused, should have been believed by the jury.

Appeal against an order of the Sessions Judge, Surat.

The facts appear from the Judgment.

Mr. *B. G. Rao*, Assistant Government Pleader—for the Crown.

Messrs. *G C O'Gorman* and *V. N. Chhatrapati*—for the Accused.

B. J. **wadia**, J.—This is an appeal by the Govt. of Bombay against the acquittal of the accused on the charge of murder and abatement of the commission of the offence of murder. The third accused is the father of the first and second accused who are brothers. The charge against them was that first accused on or about May 5, 1938, at about 9-30 P. M. at Malavan did commit murder by intentionlly causing the death of Ranchhod Bhula of Vasan, and that the second and third accused abetted the commission of the said offence of murder by the first accused, and there-by committed an offence under Sec 302, I. P.Code., so far as the first accused was concerned, and under Secs. 302 and 114, I. P. Code., so far as the second and third accused were concerned, The accused were tried by the learned Sessions Judge at Surat with the help of a jury. The jury unaimously came to the conclusion that the accused were not guilty of the offences with which they were charged, and the learned Judge agreeing with the verdict of the jury acquitted and discharged the accused on August 5, 1938.

The facts leading up to the alleged offence are that on the day in question (May 5, 1938) there was a marriage procession proceeding from the village of Vasan towards Malvan at about lamplight. Vasan is in the Chikhli Taluka, while Malvan is in the Taluka of Bulsar. The occasion of the procession was the marriage of one Jogi, son of Bhangia Lala Several persons from Vasan joined the procession including the wife of the deceased, her parents and her aunt. The deceased who had gone to Billimora to get a wedding present for the bridegroom joined the procession later. The procession was on the move after lamplight, but as the little child of deceased wanted to ease herself, the deceased, his wife her parents and her aunt stayed behind. Thereupon the three accused came up along with one Chankka, followed by another person, Ukadia Lala. It is alleged that

the first accused shouted, "Where is the Khandhal?" The deceased Ranchhod said that he was there. It is further alleged that thereupon the third accused caught the deceased by the neck, and the second accused held his hands, and the first accused started giving him blows with a penknife; the deceased fell down and died almost instantaneously. The defence of the accused was that they were not the aggressors; the aggressors were the deceased and Chankka; that there was a scuffle, and that the deceased was hit accidentally by a thrust of the penknife in the hand of Chankka who really intended the blow for the first accused. In the alternative, the accused alleged that they killed the deceased in exercise of their right of private defence, viz., defending their person against the attacks of the deceased and Chankka. Accused No 1 in the afternoon of the next day made a complaint in which he charged Chankka and the deceased, not knowing that he was dead, with having attacked his brother (accused No. 2) and also himself when he went to help his brother. There was a long trial, several witnesses were examined on behalf of the prosecution, but no evidence was led on behalf of the accused, and the learned Sessions Judge summed up the case at great length to the jury. As I have stated before, the jury came to the unanimous conclusion that the accused were not guilty, and the learned Judge agreeing with the verdict of the jury, ordered their acquittal and discharge.

The main grounds of appeal are: (a) that the direction given by the Judge to the jury as to the consideration of the alternative defences was not proper and should have been placed more clearly; (b) that the point whether there was occasion for reasonable apprehension in the mind of the opponents (accused) justifying the killing of the deceased was not explained to the jury in a proper way; (c) that having regard to the medical evidence and to the conduct of the first and second opponents after the commission of the murder, and to the facts stated in the counter-complaint of the first opponent, the verdict of the jury was unreasonable and unjust; and lastly, (d) that the point as to way the opponents happened to be on the spot was not put to the jury in respect of its bearing on the possible guilt of the opponents. The Govt. therefore pray that the order of acquittal be set aside and the accused dealt with according to the law, and if necessary, process be ordered to issue against the accused under Sec. 427, Cr P. Code.

EMPEROR v JHINA SOMA.

The Govt. have lodged this appeal under Sec 417, Cr. P. Code, which lays down that the Local Govt. may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. It is provided by Sec. 418 (1) that an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by a jury in which case the appeal shall lie on a matter of law only. Under Sec. 423 (2), it is provided that nothing contained in the section shall authorize the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to misunderstanding on the part of the jury of the law as laid down by him. An appeal therefore lies in cases tried by the jury on questions of law only, and under the criminal procedure, the verdict of the jury is to be considered final where there is no error of law or misunderstanding on the part of the jury of the law as laid down by the Judge, or any misdirection by the Judge, and the Judge has agreed with the verdict of the jury.

It was contended on behalf of the Crown that there was a misdirection in so far as the learned Judge did not expound the law relating to the offences to the jury. It is true that in the heads of the charge to the jury there is no reference to the sections under which the accused are charged Under Sec. 297, Cr. P. Code, it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative and it cannot be too emphatically stated that in cases tried with the help of a jury it is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. That the provision of the Code is mandatroy was again laid down recently by the Full Bench in EMPEROR v. PUTTAN HASSAN (1), and it is indeed surprising how a Sessions Judge

(1) 38 Bom. L. R 19; 160 I. C. 1060; A. I. R, (1936) Bom. 52; 1936 Cr. Cas. 164; 37 Cr. L. J. 366; 60 B. 599; 8 R. B. 293 (F.B.).

who is usually a man of considerable experience, can proceed to charge the jury without, in the first instance, explaining the law on the subject. Such explanation is necessary in all cases and is certainly very important in a case where the charge is one of murder. It is incumbent upon the Judge to explain what is culpable homicide under Sec. 292, I. P. Code, and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not under Sec. 300. An important non-direction to the jury or an omission to direct them on an important point, amounts to misdirection; but we must read Sec. 297 along with the provisions of Sec. 537 of the Code. In that section it is laid down that

"subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity (as mentioned in sub-cl. (a) of that section) or of the omission to revise any list of jurors or assessors in accordance with sec. 324 or of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection, has in fact occasioned a failure of justice."

There are therefore three categories coming under this section, first, where there is an error, omission, or irregularity, in any stage of a trial or enquiry or proceeding; secondly, where there is an omission in revising the list of jurors or assessors; and thirdly, in the case of misdirection in the charge to the jury. It is necessary, however, that the misdirection should be such as to occasion failure of justice, such failure of justice as would vitiate the trial or proceedings. The misdirection causing failure of justice may at times arise in relation to the case for the prosecution; but in the majority of cases the effect of a misdirection to the jury comes up for consideration on the ground that it has prejudicially affected the accused. There is, however, no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice. It was undoubtedly the bounden duty of the Sessions Judge to explain the law to the jury before dealing with the evidence, but I do not think that the omission to read and explain the relevant sections in this case has been such as can be said to have occasioned a failure of justice. It was pointed out to us by the learned Counsel for the accused that this ground was not even taken by Govt., but that would not debar the prosecution from urging it in the appeal.

The only other ground that was mentioned to us was that the alternative defence, viz., that the accused acted in self-defence or defence of their person, was not fully and properly explained to the jury. The learned Judge, however, clearly pointed out the alternative defence to the jury, and we find it stated by the Judge in para. 4 of his charge to the jury that it was suggested that it was the deceased who was the aggressor and caused serious injuries to accused No. 2, and that a reasonable apprehension arose in the mind of the accused about their own safety, and that on account of that apprehension they attacked the deceased in self-defence and killed him. At the end of his long summing-up the learned Judge also told the jury that, although the defence of self-defence was not raised by the accused and was not suggested in the cross-examination of the prosecution witnesses, and although it was inconsistent with the other defence put forward by the accused, it was still open to the jury to consider it and to see whether, in the circumstances of the case, it was made out or not, The learned Judge was right in putting this alternative defence to the jury for their consideration in the way he did It was, however, open to the jury to come to the conclusion on the evidence of the witnesses, whom they had seen and whom they had heard, that the prosecution had failed to establish the case against the accused. In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defence taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury. It was for the jury to consider what weight they should attach to the evidence that was led before them. Apart from the omision to explain the law, the learned Judge summed up the evidence very clearly and fairly on both sides, and left the matters which were within the province of the jury entirely for their consideration. Under the circumstances, we see no reason to inrerfere with the verdict. No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. There is a case

reported in EMPEROR v. BAI LALI (1) where the Sessions Judge had disagreed with the verdict of the jury and submitted the case under Sec. 307, Cr. P. Code to the High Court, and yet the High Court held that, unless there was any perversity in the verdict or any misdirection there was no reason why they should interefere with the verdict. Taking all the facts of the case and the evidence into consideration, I am of opinion that the appeal fails and must be dismissed.

Kanla, J.—I agree, Sec. 297, Cr. P. Code in very clear terms enjoins the Sessions Judge to charge the jury by summing up the evidence for the prosecution and defence, and laying down the law by which the jury is bound. The omission to do this may or may not cause a miscarriage of justice. Sec. 537 of the Code provides that if a misdirection (and an omission to lay down the law would be a misdirection) causes a failure of justice, it would vitiate the trial. Therefore, in the present case we have to find whether the Court failed to lay down the law as provided in Sec. 297, and if so, whether there was a miscarriage of justice. Unless both those questions were answered in the affirmative, the verdict should not be disturbed.

On going through the record it appears that the learned Sessions Judge has not re-capitulated the relevant sections of the I. P. Code. To that extent it may be stated that there was omission to lay down the law. It appears very clearly, however, that in different portions of his summing up he had stated to what extent and under what circumstances the right of private defence of person could be exercised by the accused. He had also pointed out that this defence was not put forward in the cross-examination of the witnesses, but was seriously urged in the course of the argument of the Advocate for the accused. He also properly pointed out at the close of the summing up that, in spite of the failure of the Advocate for the accused to set up this defence and to cross-examine the prosecution witnesses on that point and although the defence was inconsistent with the other defence, if the jury on the materials before them thought that case of self-defence of person was established, it would be their duty to consider it, and give effect to their conclusion. To that extent therefore the learned Judge considered the evidence and gave directions on the point of private

(1) Ind. Rul. (1932) Bom. 490 (1); 23 Cr. L. J. 745 (139 I. C. 272); 34 Bom. L. R. 896.

defence, and I do not think therefore that the charge suffers from any serious omission. On going through the whole record, I do not think that there has been any failure of justice occasioned in this case, and therefore I do not think this Court should interfere with the unanimous finding of the jury.

I cannot allow this case to pass without emphasizing that the provisions of Sec. 297, Cr. P. Code are emphatic, and overlooking the same is likely to give rise to a miscarriage of justice and considerable waste of public time and money. It is necessary that the provisions of this section should be rigidly adhered to and not overlooked. Even at the cost of repetition, the law should clearly be expounded, especially when the charge is one of murder, otherwise serious consequences are likely to ensue which a high judicial officer could and should avoid.

B.P.C.

(s. c.) 44 C. W. N. 114 ; 70 C. L. J. 355 ; (1940) A. I. R. Cal. 33.

Appeal No. 188 of 1935.

Present :—R. C. MITTER and MAHAMAD AKRAM JJ.

2nd August, 1939.

RANADA KISHORE ROY.

v.

SWARNAMOYEE DEBI.

Hindu Law—Widow—Co-sharers—Partition—Not entitled to exclusive title of property so acquired—Account Book—No explanation given.

Held—That a Hindu widow has a right to bring a suit for partition against her co-sharer. All that has to be secured in favour of the reversioners is that the partition should be so carried out as to affect their rights.

Held again—That no credible explanation has been given why the defendant has not produced the account books which has been taken out of Court by him after the institution of the suit and it is a ligitimate comment of the other side that if these account books had been produced by the defendant they would have defended the plaintiff.

Appeal against the decree of the Sub-Judge of Mymensingh.

The facts appear from the Judgment.

J. M. Chowdhury and *R. N. Chowdhury*—for the Appellant.

G. Sanyal, P. C. Pakrashi and *B. C. Banerjee*—for the Respondent.

RANADA KISHORE v. SWARNAMOYEE DEBI

Judgment.—This is an appeal by the defendant in a suit instituted by the plaintiff for partition by metes and bounds of her eight-annas share in a large number of properties which are described in the schedule to the plaint. She has also prayed for a declaration of title to eight-annas share in two touzis Nos. 2575 and 2576 which are known as the Syamagram properties and are included in item 4 of the plaint. The facts admitted are these :

The common ancestor was Harikishore Roy who died leaving two sons, Ramani Kishore Roy and Nalini Kishore Roy. Ramani was the eldest. His son Ranada is the defendant in the suit. Nalini Kishore Roy died on 3rd March 1902 when he had just attained majority. He left him surviving a childless widow Swarnamoyee Debi who is the plaintiff. He had executed on 11th May 1901 a will by which he appointed his brother Ramani Kishore, executor. By the will, his widow Swarnamoyee was given the power to adopt a son. Ramani took out probate of this will in the year 1902 shortly after the death of Nalini. In this case we need not go into the question as to whether a permission to adopt had also been given to Swarnamoyee orally by her husband or not. In any event, she had the power of adoption whether by virtue of the permission given by the will or by virtue of the oral permission alleged to have been given to her by her husband. In 1903, Swarnamoyee adopted the youngest son of Ramani Kishore and named him Narmada Kishore, The adopted son died unmarried in the year 1915. The position therefore is that the beneficial interest in the estate which was not admittedly disposed of by the will of Nalini Kishore belonged to Swarnamoyee from the date of the death of Nalini till the adoption. After the adoption the beneficial interest vested in the adopted boy and on his death Swarnamoyee, his mother inherited the beneficial interest from him. She has from the date of the death of her adopted son a widow's estate in the properties which may be found to be properties joint between him and Ranada. Ramani Kishore died on 9th January 1922. During his lifetime he was in possession of a half-share of the joint estate in his own right and the other half-share as executor to the estate of Nalini Kishore Roy. It appears that after the death of Ramani differences arose between Ranada and Swarnamoyee. In September or October 1924, there was a separation between the two and Swarnamoyee and Ranada began separate collection of rent.

There was also by this time separation in mess. It was probably in December 1924. On 7th January 1925 Swarnamoyee instituted a suit for accounts against Ranada. That suit terminated in a compromise decree passed by this Court on 7th July 1931. The compromise decree is an exhibit in the case (Ex. 24, Vol. II, p. 321 of the paper-book). We will have to deal in some detail with the terms of this compromise decree and with the proceedings in execution which followed this compromise decree in a later part of the judgment when we will be dealing with the merits of the contentions raised by the parties before us as to the plaintiff's title or share in some of the properties to which she has laid a claim to the extent of 8 annas share. The defendant raised many points in his defence. The written statement is a prolix document. The contentions of the respective parties however appear clearly from the judgment which has been delivered by the learned Subordinate Judge.

The first defence which raised a preliminary point was that the suit for partition by the plaintiff is not maintainable inasmuch as it was not a bona fide suit at all. The second defence was that the suit was bad for non-joinder of parties. The third defence was that certain properties were the self-acquired properties of Ramani and in some other properties the share of Ranada was more than the share of the plaintiff. The difference in the shares according to the defendant was brought about by reason of the acquisition by Ramani for his own benefit and advantage from out of his own funds of certain shares which belonged to others. We have quoted above the defences which are material for the purpose of considering the points which have been raised before us in this appeal. Those contentions are :(1) that the suit is not maintainable; (2) that mouza Koyedi which is item 1 of the plaint belongs exclusively to defendant 1. In any event the plaintiff is not entitled to claim more than 5 annas share in the said property; (3) that a partition of mouza Koyedi cannot be made in this suit as necessary parties have been left out; (4) that the plaintiff has not eight annas share in Muktirkandi which is item 12 of the plaint; (5) that the Bhayabapa Kutchery which forms a part of item 2 of the plant belongs exclusively to the defendant; and (6) that touzi No. 2575 belongs exclusively to the defendant and touzi No. 2576 exclusively to the plaintiff. The plaintiff cannot have eight annas share in both those touzis on the footing that both of them are joint properties of the plaintiff and the defendant.

RANAHA KISHORE v. SWARNAMOYEE DEBI.

The first question is whether the suit for partition is maintainable or not. We have already stated that the plaintiff has only a widow's estate in the properties left by her adopted son and also in those properties which were subsequently acquired by Ramani on his own behalf and on behalf of the estate of his brother Nalini Kishore. She represents the estate fully. It is only that her powers of alienation are limited. Any decree passed in her favour or against her in a bona fide litigation fairly fought out or fairly compromised would bind the reversioner. These principles are well established. Under the circumstances it is necessary to see whether a person having such an estate is entitled to maintain a suit for partition against her cosharer or cosharer of her late husband. This question was considered by a Full Bench of this Court in JANOKI NATH v. MATHURA NATH (1). The judgment of the Full Bench was delivered by Ramesh Chandra Mitter J. It was held that a Hindu or a transferee from a Hindu widow is entitled to maintain a suit for partion against the co-widow and her husband's coSharers. Mr. Chowdhury appearing on behalf of the appellant has cited before us a judgment delivered by the same learned Judge in the same volume in MOHADEAY KOER v. HARAK NARAIN, (2) The passage on which reliance has been placed by the appellant is on pp. 250 and 251 of the report. The learned Judge points out that the right of enforcing partition is generally a common incident in a joint undivided property. Then he observes that from that it does not follow that a Civil Court would be bound to decree partition at the instance of a Hindu widow without a special case of necessity being established for partition. The interpretation put upon this passage by Mr. Chowdhury is that a Hindu ought generally to be refused partition unless she establishes special cause or necessity. That may be the correct interpretation of the passage, if it be taken out of the context. If that is what Mitter J., meant by this passage, he himself has expressed himself otherwise when delivering the judgment of the Full Bench in the case which we have noticed above. In MOHADEAY KOER v. HARAK NARAIN (2) referred to above the learned Judge then points out the peculiarity of a Hindu widow's estate. He rightly pointed out that she represents the estate yet the person

(1) 12 C. L. R. 215 (F. B.); (1883) 9 Cal 580.
(2) (1883) 9 Cal; 244.

who would take after her would not take through her but would take as the heir of the last male owner. It is also pointed out that till her death it is not certain as to who would be the next taker. Then, he says that under those circumstances, it would be the duty of a Court of justice to see, before decreeing partition, that the interest of the presumptive heir be not affected by its decree. This passage means that having regard to the fact that a Hindu widow represents the estate, the Court should be careful to see that by the partition the interest of the presumptive reversioner may not suffer. That means that a partition is to be decreed but in making the allotment, care should be taken that the allotments are fair, for the decree made would bind the next taker who does not take through the widow but through another man, namely the last male owner, Then the learned Judge observes that before decreeing partition, the Court should be satisfied that the claim for partition is a bona fide one arising out of such necessity as renders partition desirable between two joint owners. The force of the last mentioned passage, in our judgment, has been affected by the decision of the aforesaid Full Bench. We think that the law has been put correctly by a later decision of this Court in BEPIN BEHARI v. LAL MOHUN (1). The passage which is at p. 212 runs thus :

> That a Hindu widow has a right to partition has been established by the Full Bench decision in *Bepin Behari* v. *Lal Mohun* (1) and the assignee of a Hindu widow is in the same position. All that has to be secured in favour of the reversioners is that the partition should be so carried out as not to affect their rights.

This is exactly what we have said as the law on the subject. Even if the observation of Mitter, J., in MOHADEAY KEOR v. HARAK NARAIN (2) to the effect that only when the claim of the widow for partition is a bona fide one arising from such necessities as render partition desirable between the two joint owners is still good law, we do think that on the facts of this case partition is desirable. Those facts are these that the claim of the plaintiff to a large portion of the properties was denied before the institution of this suit. In 1926, she laid a claim to eight annas share of taluk No. 2572 in a rent suit instituted by the defendant against a tenant claiming 16 annas

(1) (1886) 12 Cal. 209.
(2) (1883) 9 Cal. 244.